Neutral Citation No: [2023] NIKB 12	*Ref:* SCO12073
	ICOS No: 19/008027 19/065082 19/068477
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* 17/02/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'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 applicant
Ronan Lavery KC and Malachy Magowan (instructed by Phoenix Law) for the second applicant
Ronan Lavery KC and Mark Bassett (instructed by Brentnall Legal Ltd) for the third applicant
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

---

SCOFFIELD J

Introduction

[1] There are three applications for judicial review before the court which were heard together, given that they raise common issues. In each case, the applicant is a registered terrorist offender who is subject to notification requirements under the Counter-Terrorism Act 2008 (as amended) and associated secondary legislation. These requirements obligate the applicants to provide the police with a range of personal details and information and, importantly in the context of these cases, with details of planned travel outside the United Kingdom.

[2] Significantly, the requirements were amended in April 2019 to require advance notification of *any* intention to travel outside the United Kingdom, rather than, as was previously the case, a requirement only to notify an intention to leave the United Kingdom for a period of three days or more. This enhanced requirement imposes a materially increased burden on the applicants, each of whom contends that they have occasion to travel to the Republic of Ireland with varying degrees of frequency. In addition, the 2019 amendments required notification of additional categories of information which had not previously been the subject of such a requirement.

[3] The applications for judicial review collectively raise issues of the statutory scheme's compatibility with the applicants' Convention rights, with EU law relating to free movement, and with data protection law. All parties agreed, further to the decision of the United Kingdom Supreme Court in *Re McGuinness' Application* [2020] UKSC 6, that these applications did not constitute a criminal cause or matter for the purposes of RCJ Order 53, rule 2 or section 35 of the Judicature (Northern Ireland) Act 1978.

[4] Ms Quinlivan KC and Ms Askin appeared for the first applicant (Anthony Lancaster); Mr Lavery KC appeared for the second and third applicants (Sharon Rafferty and Anthony McDonnell) with Mr Magowan and Mr Bassett respectively; Ms Murnaghan KC appeared with Mr Kennedy and Mr Thompson for the two respondents (the Police Service of Northern Ireland and the Secretary of State for the Home Department); and Mr McGleenan KC and Mr McAteer appeared for the Department of Justice as a notice party, exercising its right to participate further to service of an incompatibility notice under RCJ Order 120. I am grateful to all counsel for their helpful written and oral submissions.

The statutory scheme

[5] These proceedings concern Part 4 of the Counter-Terrorism Act 2008 ("the 2008 Act"), which imposes a range of notification requirements on registered terrorist offenders (RTOs). Section 40 of the Act is introductory in nature and sets out the scheme of that Part. Sections 41 and 42 specify the offences to which the notification requirements apply, both terrorism offences and offences having a terrorist connection. Section 44 specifies the persons to whom the notification requirements apply, namely a person who is aged 16 or over at the time of being dealt with for an offence to which Part 4 applies and who is made subject to a sentence or order triggering the notification requirements. Those sentences or orders are defined by section 45 and, in this jurisdiction, by section 45(3). Section 53 makes provision for the period for which the notification requirements apply and establishes a graduated scheme in this regard, based on the age of the offender and the type and length of sentence which they have received. The requirements will apply for a period of 30 years, of 15 years, or of 10 years, depending upon the circumstances.

[6] Section 47 sets out the details which an RTO is required to notify initially, when first made subject to notification requirements. The information must be notified to

the police within a period of three days beginning with the day on which the person is dealt with in respect of the offence in question. Section 47(2), in its present form, provides that:

> "The information required is—
>
> (a) date of birth;
>
> (b) national insurance number;
>
> (c) name on the date on which the person was dealt with in respect of the offence (where the person used one or more other names on that date, each of those names);
>
> (d) home address on that date;
>
> (da) all contact details on that date;
>
> (e) name on the date on which notification is made (where the person uses one or more other names on that date, each of those names);
>
> (f) home address on the date on which notification is made;
>
> (fa) all contact details on the date on which notification is made;
>
> (g) address of any other premises in the United Kingdom at which, at the time the notification is made, the person regularly resides or stays;
>
> (ga) identifying information of any motor vehicle of which the person is the registered keeper, or which the person has a right to use (whether routinely or on specific occasions or for specific purposes), on the date on which notification is made;
>
> (gb) the financial information specified in paragraph 1 of Schedule 3A;
>
> (gc) the information about identification documents specified in paragraph 2 of Schedule 3A;
>
> (h) any prescribed information."

[7] "Prescribed" information in this context means information prescribed by regulations made by the Secretary of State for the Home Department (SSHD) ("the Secretary of State"). In determining the period within which notification is to be made under section 47, certain periods of detention are to be disregarded pursuant to section 47(4).

[8] Sections 48 and 48A impose an obligation to notify when relevant details change; and section 49 imposes an obligation of periodic re-notification. The re-notification obligation will generally require the information specified in section 47(2) to be re-notified to the police on an annual basis (unless the individual concerned has no sole or main residence in the United Kingdom, in which case much more frequent re-notification is required).

[9] Section 50 makes provision for the method of notification and related matters. It applies to an initial notification under section 47, the notification of changes under sections 48 and 48A, periodic re-notification under section 49 and notification on return after absence from the UK under section 56. By virtue of section 50(2), notification must be made by the person attending at a police station in their local police area and making an oral notification to a police officer or to a person authorised for that purpose by the officer in charge of the station. The notification must be acknowledged and this must be in writing: see section 50(4) and (5). The person making the notification must, if requested to do so, allow the officer or person to whom the notification is made to take their fingerprints and/or a photograph of them (or any part of them) for the purpose of verifying their identity. Their "local police area" will generally be the area in which their home address is situated but – by virtue of section 51(3) – all of Northern Ireland is treated as one police area, so that notification in this jurisdiction can apparently be made at any police station.

[10] Section 52 is an important provision in the context of these proceedings. It relates to travel outside the United Kingdom. By virtue of section 52(1), the Secretary of State may by regulations make provision requiring a person to whom the notification requirements apply who leaves the United Kingdom to notify the police of their departure before they leave and to notify the police of their return if they subsequently return to the United Kingdom. Section 52(2) provides as follows:

> "Notification of departure must disclose—
>
> (a) the date on which the person intends to leave the United Kingdom;
>
> (b) the country (or, if there is more than one, the first country) to which the person will travel;
>
> (c) the person's point of arrival (determined in accordance with the regulations) in that country;

(d) any other information required by the regulations."

[11] Under section 52(3), notification of return must disclose such information as is required by the regulations about the person's return to the United Kingdom. Notification under section 52 must also be given in accordance with the regulations.

[12] Regulations, which were subject to the affirmative resolution procedure, have been made under section 52 in the form of the Counter-Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009 ("the 2009 Regulations"). Regulation 3(1) initially provided that notification was required in respect of absences from the UK for a period of three days or more; but now applies simply when an RTO intends to leave the UK. Regulation 3(3) sets out the information which is required to be notified. That is the information which must be disclosed in accordance with section 52(2)(a) to (c) (see para [10] above); and "so much of the following information as the person holds", namely:

"(i) where the person intends to travel to more than one country outside the United Kingdom, the person's point of arrival in each such country (other than the point of arrival specified in section 52(2)(c)),

(ii) the name of the carrier the person intends to use to leave the United Kingdom and to return to the United Kingdom,

(iii) the name of any carrier the person intends to use to travel between countries while outside the United Kingdom,

(iv) the address or other place at which the person intends to stay for their first night outside the United Kingdom,

(v) where the person intends to return to the United Kingdom on a particular date, that date, and

(vi) where the person intends to return to the United Kingdom at a particular point of arrival, that point of arrival."

[13] Regulation 4 of the 2009 Regulations governs the timing of notification of departure in respect of foreign travel. Where a person knows any of the required information more than seven days before the date of their intended departure, the person must notify such of the required information as they hold not less than seven days before that date or "if the person has a reasonable excuse for not complying with

the seven day notification requirement, as soon as practicable but in any event not less than twenty-four hours before that date": see regulation 4(1). Where the individual concerned has made such a notification but the information so notified does not contain *all* the required information, or at any time prior to their intended departure the information so notified becomes inaccurate, then the person must notify to the police the remaining required information, or the changes to the required information as the case may be, not less than 12 hours before the date of their intended departure (unless they have a reasonable excuse for not complying with that 12-hour notification requirement, in which case they must make the notification as soon as practicable but in any event before the person's departure from the United Kingdom): see regulation 4(2) and (4). The 12 hour notification requirement (with the reasonable excuse caveat) also applies where the person does not know any of the required information more than seven days before the date of their intended departure: see regulation 4(3). Regulation 5 deals with the requirement to notify one's return to the United Kingdom. A returning RTO must notify the date of their return to the UK and their point of arrival in the UK, unless those details were notified in advance to the police before departure (in accordance with regulation 4) and that previous notification was correct.

[14] The 2009 Regulations also deal with the method of notification. Section 50 of the 2008 Act deals with this for some matters (see section 50(1) and para [9] above) but *not* for section 52 travel notifications. Importantly, regulation 6(1) provides that a notification of intended travel in accordance with regulation 4(1), or notification of return in accordance with regulation 5(2), must be made by the person "(a) attending at a police station in the person's local police area; and (b) making an oral notification to a police officer or to a person authorised for the purpose by the officer in charge of the station." Similar provision is made by regulation 6(2) in respect of notifications in accordance with regulation 4(2) or (3). In each instance, the person making a notification in accordance with the regulations must inform the police officer, or the person to whom the notification is made, of their name, home address, and date of birth: see regulation 6(3).

[15] Section 54 creates a number of offences relating to notification. In particular, although not exhaustively, a person commits an offence if they fail without reasonable excuse to comply with the initial notification requirements under section 47; the obligation to notify changes under sections 48 and 48A; the obligation of periodic re-notification under section 49; or the requirements of regulations made under section 52(1) in respect of travel outside the UK. Unsurprisingly, it is also an offence to make a notification in purported compliance with those obligations of any information that the person knows to be false. These offences carry penalties, on summary conviction, of imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both; and, on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both. The "reasonable excuse" provision is important. It is a constituent element of offences under section 54(1)(a) that the person "fails without reasonable excuse to comply" with the requirements. The burden of proof on this issue (to the criminal standard) therefore falls on the prosecution. This is an important protection against over-enforcement of the notification requirements

giving rise to criminal convictions. The circumstances relied upon where a reasonable excuse is raised by an RTO will also no doubt be factored into any assessment of the public interest test in cases where the Public Prosecution Service (PPS) is considering commencement of a prosecution.

[16] If a person to whom the notification requirements apply is absent from the UK for any period, the period for which the notification requirements apply continues to run. As a general rule, this period of absence does not affect the obligation under section 47 to make an initial notification; but the application of the requirements is otherwise modified. Section 56 deals with notification requirements on return after a period of absence from the UK.

[17] I have set out above an outline of the statutory scheme as it applies at present. However, a range of amendments were introduced in 2019 by the Counter-Terrorism and Border Security Act 2019 ("the 2019 Act"). It is the additional requirements introduced at that point to which these proceedings are addressed.

[18] The 2019 Act made number of significant amendments to the pre-existing regime set out in the 2008 Act. For instance, section 12(3)(b) and 12(6) of the 2019 Act amended section 48 of the 2008 Act and introduced a requirement upon individuals to provide contact details such as telephone numbers and email addresses. Section 12(4) of the 2019 Act inserted a new section 48A into the 2008 Act imposing a requirement to provide financial information and information about identification documents. Section 12(3)(b) and (c) also introduced new provisions in relation to the notification of vehicles which the individual owns or uses. The 2019 Act also amended the 2009 Regulations by means of para 51 within Part 4 of Schedule 4 to the Act. This, inter alia, removed the reference to "for a period of three days or more" in regulations 3 and 5, thus increasing the number of notifiable trips outside the UK; and replaced the period of 24 hours with a period of 12 hours in regulation 4(4).

[19] The key changes arising from the 2019 amendments related to the new requirements to notify contact details (other than home address or other regular addresses), financial information, vehicular information and identification documentation; and an altered requirement to provide notification of all travel outside the UK. All of these new requirements are challenged in these proceedings; although the focus of the argument was very much on the amended travel notification requirements.

Mr Lancaster's factual circumstances

[20] On 15 October 2015, Anthony Lancaster was convicted of an offence of assisting in arranging a meeting to be addressed by a person who belongs or professes to belong to a proscribed organisation, in that case the IRA. This is an offence under section 12(2)(c) of the Terrorism Act 2000 ("the Terrorism Act"). Section 12 of that Act creates a number of offences in relation to support for proscribed organisations. The charge arose from an event in Derry City Cemetery, staged by the 32 County Sovereignty

Movement. On Mr Lancaster's case, the circumstances of the offence were simply that he had introduced and held the microphone for the speakers at the event, held on 9 April 2012. It was addressed by a masked man who gave a speech on behalf of Óglaigh na hÉireann / the Real IRA in which he stated that the IRA would continue to attack "Crown force personnel" as well as "British interests and infrastructures." Mr Lancaster was sentenced to 12 months' imprisonment, with that sentence being suspended for a period of three years. His offence triggered the notification requirements under section 45(3)(a)(ii) of the 2008 Act. As a result of this conviction, therefore, he is an RTO and is subject to the notification requirements for a period of 10 years from the date of the sentence, that is, until 15 October 2025.

[21] Under the original provisions of the 2008 Act, Mr Lancaster had to notify the PSNI of details such as his name, address, date of birth and national insurance number, as well as any changes to these. As noted above, the details had to be reconfirmed to police every year. Also, if he intended to leave the UK for a period of three or more days, he then had to notify the police of the date when he intended to leave; the country or countries to which he intended to travel; his point of arrival in each country; the name of the carrier or carriers he intended to use; and the address at which he intended to stay for his first night outside the UK. If he intended to return to the UK, he also had to notify the date of his intended return; the intended point of arrival, and (if he left the UK for a period of three or more days) upon his return had to notify the police of his date and point of return within three days of having returned, provided this had not already been correctly pre-notified.

[22] This applicant has averred that he had complied fully with these requirements up until receiving a letter from the PSNI dated 12 April 2019 informing him of changes to the notification requirements. He says that this letter was delivered to him at his home by a police officer on 18 May 2019 and was from Detective Inspector Hamlin, although it was unsigned. (DI Hamlin is deployed in the Terrorism Investigation Unit of the C2 Serious Crime Branch of the PSNI and is the first respondent's principal deponent in these proceedings. He has since been elevated to the rank of Detective Chief Inspector but is referred to throughout this judgment in the rank which he held at the material times.) The letter set out new and more extensive notification requirements to which Mr Lancaster was now subject following amendments made by the 2019 Act. I return to the detail and text of this letter, and subsequent correspondence, below.

[23] The letter of 12 April 2019 indicated that a person who made repeated frequent trips to the Republic of Ireland (for example, in the course of their work or to visit relatives) may submit a single notification in respect of each category of repeated frequent visits. Mr Lancaster says his concern is that there is very little detail as to how that will work; and, in particular, how it would work if a planned trip for one purpose spontaneously evolved into a trip for a different purpose. He says that in the absence of proper guidance in relation to precisely what is required, he is concerned that, despite trying to comply with the notification requirements, he may be leaving himself liable to prosecution for breach of them.

[24] Mr Lancaster complains about the impact of the new requirements upon him, particularly in relation to notification of travel. Under the new requirements, he is obliged to notify the PSNI of any occasion on which he leaves the UK irrespective of the length of time for which he is out of the UK. His evidence is that he often leaves the UK for very short periods of time, for example if he travels across the border to get petrol for his car (which he does every few days, since fuel is cheaper in Donegal). In the course of such a trip, he would typically be out of the UK for only approximately 30 minutes. However, in order to notify the police about his intention to leave the UK in such circumstances, this would involve him travelling to the police station, waiting for a police officer to be available, making an oral notification, waiting for him to write it down, and then leaving the police station to travel out of the UK to get petrol for his car. He makes the point that there may naturally be occasions when he goes to Donegal for one purpose and intends to return at a certain time or at a certain point but then changes his plans. If that were to happen, he says that he would need to go to the police station again on his return from Donegal to inform the police that his notification in relation to his intended return was not accurate and to instead notify them of the correct details.

[25] The first applicant has provided much greater detail in his evidence about his frequent travel to the Republic of Ireland than the applicants in the other proceedings which are also before the court. This is because it appears that Mr Lancaster has occasion to cross the border much more regularly. He lives in Derry, just a couple of miles from the border. He has averred that, in his experience of making notifications about his intention to leave the UK, it "can take up to 45 minutes." He says that this estimation includes the time taken travelling to the police station from his home (which is approximately 1.6 miles), parking at the police station, making the notification and then returning home or travelling to the border with Donegal. He says that if he did not have to make a notification, it would only take approximately 10 minutes to travel from his house to the point at which he would cross the border.

[26] Mr Lancaster has provided evidence, which is not contentious, about how easy it is to cross the border between Northern Ireland and the Republic of Ireland. He can walk across it and travel across it easily by car. There is no need to queue at a border checkpoint or show any identification. There is nothing at the border to suggest that it is a border and, he says, for him it is like driving anywhere in Northern Ireland. Obviously, crossing this land border is qualitatively different from leaving Great Britain to travel to another country outside the UK by means of a flight or ferry, or even the Eurostar train.

[27] Mr Lancaster also avers that he has family and friends who live in the Republic of Ireland, whom he visits regularly. He also travels to the Republic of Ireland regularly for social and leisure purposes. He has provided some further details by way of example. For instance, his wife's brother is a priest who lives in Killea, which is just across the border in Donegal and 3.9 miles from his house. His wife and he would visit his brother-in-law regularly, some 3 to 4 times every week. There is no set

pattern to this and the visits are usually decided upon very soon before they occur, he avers. His wife does not drive and has never learned to drive and so is dependent upon this applicant driving her anywhere she wants and needs to go. The same brother-in-law is said to be "not very good with his hands" so that he requires and appreciates assistance in looking after his house, his garden or his car. Mr Lancaster assists him in that regard, including when he is telephoned and asked to come and help with cutting the grass, DIY, or matters such as that. These are matters which arise routinely but without significant notice. His wife often travels with him and would assist her brother by preparing meals or helping with housework. She is said to be concerned about having to attend the police station to make notification requirements if travelling with the applicant and he says that this causes her anxiety, distress and embarrassment.

[28] Mr Lancaster's wife's sister lives in Muff in Donegal, which is again just across the border, but in the opposite direction to Killea. He and his wife would visit his sister-in-law regularly, again about 3 to 4 times per week, and usually in the afternoon. Her house is approximately 7.7 miles from this applicant's house. Often decisions to visit will be taken on the spur of the moment and depend on factors like the weather and other commitments. These visits are said to be regular but are not generally planned in advance so that again (the applicant asserts) he would have to attend the police station on the way to his sister-in-law's house.

[29] The applicant's son is employed in a factory at Burnfoot, which is also just across the border. This is approximately 7.2 miles from Mr Lancaster's house. His son does not drive and Mr Lancaster used to take him to work every day and pick him up again after work. He starts work at approximately 7.30 am each morning and finishes at approximately 4.30 pm each afternoon. Mr Lancaster has averred that there is no public transport that he could take; that he does not earn enough to justify getting a taxi to and from work every day; and that there is no one else who would be able to take him. Since this is a regular commitment, he hoped that he would be able to notify the PSNI of this travel on a "block basis"; but at the time of swearing of his grounding affidavit in these proceedings, he did not know if this would be possible. In any event, he has concerns if he took his son into work and did not then return home but did something else and therefore his regular plan changed. If he was required to notify the police on his way to, and on his way back from, his son's work, he is concerned that people in the area would associate his son with regular visits to the police station; and a requirement of notification en route to his son's work may on occasion result in his son being late for work, given that the time taken for the notification process would be outside their control. A separate issue arises because, although his son normally works Monday to Friday, he occasionally works overtime on a Saturday: but this cannot be covered in a 'block notification' by simply advising about the *potential* of travel; and if a positive intention to travel is notified which later transpires to be unnecessary, a further attendance at the police station is required to update the notification.

[30] Mr Lancaster further avers that a significant proportion of his socialising and leisure activities take place across the border. He believes that he has this in common with the majority of people who live in his area, particularly those who are Irish nationals or who are Catholics who live near him (he avers). By way of further example, he says that he is a fan of Derry City Football Club, which plays in the league of Ireland and therefore has all of its games (apart from home games) played in the Republic of Ireland. He is a season ticket holder and tries to get to all of the matches, which involves travelling across the border to places such as Dublin, Dundalk, Ballybofey, Sligo and others. He is also a fan of the Derry GAA team and will often travel to Gaelic football matches across the border, for example in Ballybofey, Cavan and Clones. He would also cross the border for the purposes of going out for dinner or going to the cinema, which would usually be on the spur of the moment. If he was at a football match with friends across the border, he may on the spur of the moment decide to have a drink and stay the night, which he has done on several occasions. Where this occurred, it would mean that any notification he had given to the police about his return date would be inaccurate and he would have to go to the police station to notify them of this upon his return. Mr Lancaster also regularly travels to Donegal for day trips, to places such as Gweedore, Buncrana, Bundoran and other places. These trips are usually weather dependent and would be decided upon shortly before departure.

[31] This applicant is concerned not just about the time and effort spent making notifications but also the effect which he believes they are likely to have on his family members and him – causing anxiety, frustration and impatience and significantly detracting from the enjoyment of day trips and travelling for social and leisure purposes. He also believes that the notification requirements are likely to cause embarrassment for him and his family, particularly if they are travelling with other people and have to explain that they need to attend the police station before crossing the border. He is further concerned about local people identifying him and anyone who is with him as someone who is required to attend a police station on a regular basis, which is likely to cause them to ask why this is so and perhaps speculate wrongly about this.

[32] Mr Lancaster is also concerned that if he has to travel across the border for a family emergency, then he will be in breach of the notification requirements if he does so without providing the advance notification which would usually be required.

[33] This applicant also has concerns and complaints about a number of other new notification requirements which have been imposed, most notably in relation to vehicle notification requirements and financial notification requirements. Under the new notification requirements he must notify the PSNI of the make and registration number of any vehicle that he owns and also details of where he keeps that vehicle. In addition, if he drives someone else's car, then he must notify the PSNI of the make and registration number of that vehicle and where it is normally kept; and this notification must be given as soon as he starts using the car. If he stops using that other's car, then he must also notify the PSNI of the fact.

[34] In this regard, Mr Lancaster avers that if there is anything wrong with his brother-in-law's car or with his sister-in-law's car, then he will usually arrange to have it fixed, since neither of those persons have a good understanding of how cars work and apparently do not know anyone who fixes cars. In contrast, Mr Lancaster has a number of local mechanics who have lived near him all his life and, therefore, if there is a problem with one of their cars, he will drive his own car to the house of his brother-in-law or sister-in-law, pick up their car and drive it to a mechanic's premises where he will leave it to be fixed, before later picking it up again and returning it. He says this is cheaper for his relatives because mechanics are cheaper in Northern Ireland and give him a good deal by reason of his prior relationship with them. He contends that, under the new requirements, such an enterprise would be particularly complicated, involving notification requirements about both travel across the border and the other's car which he would be driving at various points. He has also mentioned the possibility of attending a football match where another person who has brought their car has taken alcohol and then asks him to drive their car home, which would pose difficulties for him in fulfilling the notification requirements or, alternatively, would require him having to explain to those others the notification requirements arising from his being an RTO.

[35] It is worth noting that Mr Lancaster, as with the other applicants, recognised and accepted that, for a long period, the travel restrictions imposed in both Northern Ireland and the Republic of Ireland in response to the Covid-19 pandemic affected his ability to travel across the border for the reasons mentioned above in any event. Those restrictions have, of course, since been lifted.

[36] As to notification of financial arrangements, Mr Lancaster must notify the PSNI of the following information about each account he holds with a financial institution: the name of the institution and the address of the office at which the account is held; the number and sort code of the account; the card number of each payment card relating to the account and the start date and expiry date in relation to each such card (see section 47(2)(gb) and para 1 of Schedule 3A to the 2008 Act, as amended). He must also notify the police of the above information in relation to any account which he operates which belongs to someone else. Although this is not relevant for him at present, he is aware that he was previously entitled to use his mother's bank account before her death when, by reason of her age, he managed her financial affairs. If there is a change in any of the above financial information, then he must notify the police of this change within three days. Mr Lancaster believes that this is disproportionate, particularly as he has been in receipt of jobseeker's allowance for approximately five years, which he considers likely to continue for the foreseeable future; and in circumstances where he has no history of any kind of financial crimes or abusing his bank accounts for a criminal purpose. He also queries why some of these details (such as the dates from and to which payment cards are valid) are necessary.

[37] This applicant is further concerned by the fact that, if there is any change in any of the information notified, he then has to notify the police of this and re-notify all of

the information of which he has already notified them under section 47(1) of the 2008 Act. This means that, for example, if there is a change to one particular detail relating to his banking arrangements, he would then have to make a substantial re-notification of all of the information required under section 47(1) within three days.

Ms Rafferty's factual circumstances

[38] Ms Rafferty was convicted of a number of offences, including possession of a firearm, attending at a place used for terrorist training and the preparation of terrorist acts, on 12 September 2014, after entering a plea of guilty. She was sentenced to eight years' imprisonment and released on licence on 12 May 2016. As a result of her sentence, she was automatically subject to the Part 4 notification requirements under the 2008 Act and was subject to registration and notification for a period of 15 years. She lives approximately 10 miles from Aughnacloy which is close to the border. She avers that there will be times when driving when she would travel into the Republic of Ireland without even realising it or meaning to do so. She has grandchildren and considers it important that she has the option of taking them on day trips to places throughout Ireland such as Bundoran or Dublin Zoo.

[39] This applicant's mother has "a DLA car" (in the applicant's words) as she is regarded as disabled. Her mother had been hoping to include Ms Rafferty on the vehicle insurance in order that she might assist her in running errands; but she has not done so as she says she does not want to cause the police to stop and search her mother because her car is associated with an ex-prisoner. Ms Rafferty complains (as do some of her co-applicants) that, if she was to attend a police station regularly, this may put her at risk "as it would give an impression that I was providing information to [the police] about people in the community."

[40] Ms Rafferty averred that she is a member of Saoradh and remains involved in advising on prisoners' and ex-prisoners' issues but is not a member of a paramilitary organisation or involved in paramilitary activity and has put her criminality behind her. After these proceedings were issued, Ms Rafferty was arrested on 18 August 2020 and interviewed for a number of days by the police in relation to a number of offences, before being charged on 23 August 2020 with alleged offences arising out of meetings which the Security Services covertly recorded which are said to be dissident Republican meetings which discussed, inter alia, securing foreign backing for the campaign. She is currently in custody on remand facing terrorism charges in relation to her involvement in these meetings, having been refused bail. In addition, she has been charged with a range of offences of breaching the notification requirements impugned in these proceedings by maintaining unnotified financial accounts and telephone numbers, and an unnotified email address.

Mr McDonnell's factual circumstances

[41] Mr McDonnell is an Irish citizen who resides in Northern Ireland who also avers that he regularly travels to the Republic of Ireland. He lives in Belfast, rather

than in a border area. On 4 December 2013 he was convicted 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. On 6 December 2013 he was sentenced to a determinate custodial sentence of three years and six months by His Honour Judge McFarland at Belfast Crown Court. The result of this conviction and sentence is that this applicant is subject to the notification requirements for a period of 10 years. Mr McDonnell was released on licence on 3 October 2014 and his licence expired on 3 July 2016. He relies upon the fact that he was not the subject of any recall during his period of licensed supervision as evidence that he does not pose a risk to public safety.

[42] This applicant cares for two of his children in an arrangement which was described as comparable to joint residence. He avers that, together with his children, he is a very frequent visitor to his sister's caravan at a caravan site in Omeath in County Louth in the Republic of Ireland and, whilst there, uses a variety of leisure and other services. He has family members who live in Co Louth and his uncle, whom he visits, has a residence in Carlingford. He says that he regularly stays overnight at the caravan and that he could previously leave and return at short notice before the 2019 amendments. Before those amendments, he would not have stayed for a period of three nights or more (which meant that he did not have to notify the trip), although his son would have liked to stay longer. The evidence disclosed 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). Details of these alleged breaches are contained in the evidence and do not need to be repeated here; but they relate to insufficient notice having been given to comply with the 2009 Regulations.

Correspondence with the PSNI about the new requirements

[43] Each of the applicants received a letter dated 12 April 2019 from DI Hamlin of the Terrorism Investigation Unit (TIU) within the PSNI advising them of the new requirements and asking them to complete a new notification between 19 April 2019 and 19 July 2019. These letters were all personally delivered by police. The letter explains the new legislation and indicates that those who are subject to the requirements are under an obligation to re-notify police in conformity with the new requirements. Each of the notification requirements are then set out, under the following headings: foreign travel (amended requirement); contact details (new requirement); vehicles (new requirement); financial accounts (new requirement); passport (new requirement); weekly notifications for those who are homeless (new requirement); notification of name and address changes to your notified details (existing requirement); staying at another address for 7 days or more (existing requirement); national insurance numbers (existing requirement); annual notification (existing requirement); and fingerprints and photographs (existing requirement). Recipients were specifically invited to take legal advice should they have any concern and contact details for the police were provided for any queries to be raised. The letter

advised that the final deadline for notification was 19 July 2019 and warned of the potential consequences of non-compliance.

[44] In respect of the travel notification requirements, the letter advises that the applicants must notify the police of their intention to travel abroad for any period of time, which must be completed for all foreign travel. The details which are required are set out. The following then appears:

> "The notification must be completed not less than seven (7) days prior to departure.
>
> In cases where travel is required at short notice (such as urgent travel) you are obliged to notify the police as soon as practicable but not less than twelve (12) hours prior to the date of departure.
>
> In circumstances where you have given notice to leave the UK but have not provided police with full details of your travel plans, or if at any time prior to the date of your intended departure, the information notified becomes inaccurate, you must notify police not less than twelve (12) hours before the date of your departure. Upon your return to the UK you must provide police with the date of your return to the UK together with information about your point of arrival in the UK within three (3) days of your return.
>
> Amendments to the Counter-Terrorism Act 2008 (Foreign Travel Notification Requirements) Regulations 2009, contained in section 51 of the Counter-Terrorism and Border Security Act 2019 mean that all travel outside the United Kingdom, for any period of time, must be notified to police. This includes travel to the Republic of Ireland. If a person makes repeated frequent visits to the Republic of Ireland (e.g. in the course of their work or to visit relatives) they may submit a single notification in respect of each category of repeated frequent visit."

[45] In the weeks and months following the initial correspondence of 12 April 2019, the PSNI continued to engage with a variety of RTOs and their legal representatives who raised issues by way of correspondence. A further general reminder letter to RTOs was sent on 3 July 2019. Of the present applicants, it is Mr Lancaster and his representatives who have corresponded most energetically with the police and who rely most heavily on the contents of that correspondence in these proceedings. I summarise the exchanges below.

[46] Given the frequency of his travel to the Republic of Ireland, Mr Lancaster was particularly interested in how the facility of a single notification (mentioned in the letter of 12 April) might work. In a letter of 21 June 2019 to Mr Lancaster's solicitors, the PSNI indicated that they were determining their approach to the enforcement of the notification requirements but intended to ensure that the legislation was applied in a "common sense manner."

[47] Mr Lancaster's solicitors replied by letter of 25 June 2019 and received a further response from the PSNI of 1 July 2019. At that point, they indicated that they considered that the first applicant had not complied with the requirements.

[48] Mr Lancaster then received the letter from the PSNI dated 3 July 2019, which was hand-delivered to him on Saturday 6 July 2019 at his home address and was entitled "final reminder." It set out that he had not yet registered required information and reminded him that the failure to notify this by 19 July 2019 could result in his arrest and conviction for breach of the notification requirements, which could result in a five year prison sentence.

[49] On 19 July 2019 the applicant received by post a letter from the PSNI dated 9 July 2019 (which had also been sent to his solicitor by email on 10 July 2019). This letter purported to set out further details of the "common sense approach" which the PSNI was proposing to take. Ms Rafferty received a letter in materially similar terms. The applicants contend that what is invited in this correspondence goes far beyond what is required by the legislation and so evinces a misunderstanding on the part of the police. It said:

> "Whilst it is difficult to foresee every eventuality, given the multitude of possible scenarios where persons subject to this legislation may travel to the Republic of Ireland, PSNI can provide the following guidance.
>
> Where you intend to travel outside the United Kingdom on a single or non-frequent basis, then you must attend and register such travel at your local Police Station. Where the frequency of travel is such that the physical procedures associated with those requirements would be particularly onerous PSNI will adopt what it considers to be a reasonable, common sense approach.
>
> You should set out in as much detail as possible the reasons why you require to travel to the Republic of Ireland. For example, if a child for whose care you are responsible attends school there, you should state the name and address of the school, the times you will be travelling to it and your intended route.

> If you are receiving medical or other treatment in the Republic of Ireland, you should state the name and address of the institution, the dates and times you will be travelling to it and your intended route.
>
> If you enter the Republic of Ireland regularly to purchase goods or services, you should provide the name and address of the locations where you obtain or purchase such goods and services and the times when you purchase them."

[50] On 31 July 2019, Mr Lancaster's solicitor sent a letter in reply which was intended to provide the police with sufficient information to be accepted as amounting to compliance with the requirement that the applicant notify the PSNI of his "frequent" visits to the Republic of Ireland, thus avoiding the necessity for him attending the police station to notify them of his travels to the Republic on each occasion he travelled.

[51] On 6 August 2019 the applicant received a further letter from the PSNI, which indicated that the correspondence from his solicitor of 31 July did not constitute compliance with the legislation and that he was required to attend the police station personally and inform the police orally of his intention to travel. Mr Lancaster therefore attended at Strand Road Police Station with a solicitor on 7 August 2019 for this purpose. The details of this attendance are discussed below.

[52] The PSNI then sent a further letter to the applicant dated 1 October 2019. In this letter, DI Hamlin sought to provide clarity to Mr Lancaster and his legal representatives by setting out the police position with regard to a variety of scenarios and the information which they believed was required so that foreign travel notifications were made in accordance with legislation. The import of the letter is that Mr Lancaster could provide a block notification in relation to his regular leaving of his son to work; but that more information would be required in relation to this (including, for instance, the days when his son would work and those when he would be on sick leave, holiday leave or would travel by other means). The applicant contends that it is impossible to predict some of these things in advance. He also contends that this approach does not cater for a change of plan when he has travelled across the border to leave his son to work but then decides to do something else. With regard to buying diesel across the border, the PSNI letter indicated that, if Mr Lancaster knew he was going to cross the border more than seven days in advance, he should notify and give at least seven days' notice; if he had a reasonable excuse for not giving seven days' notice, he must notify no less than 12 hours in advance; and if he had a reasonable excuse for not even providing this level of notice, he should notify police as soon as practicable and in any event before his departure from the UK. The applicant complains that these requirements do not sit easily with a spontaneous decision to buy petrol in Donegal.

Summary of the applicants' cases

[53] The applicants' cases overlapped to a large degree and they cross-relied on each other's submissions. I have treated Mr Lancaster's pleaded case as being in the nature of the lead case, although essentially the same points are raised across each of the applications with some variation in pleading. Mr Lancaster has challenged the purported decision of the PSNI to require him to comply with the new notification requirements relating to:

(i) travel outside the UK (under section 52 of the 2008 Act; and regulations 3 and 5 of the 2009 Regulations);

(ii) his ownership and right to use motor vehicles (under sections 47(2)(ga) and 48(4C), (4D) and (4E) of the 2008 Act);

(iii) the provision of financial information (under sections 47(2)(gb) and 48A(1), (2) and (4) of the 2008 Act; and paras 1(1)(a) and 1(2) of Schedule 3A to that Act); and

(iv) the re-notification of information when the information which had already been notified has changed (under sections 48A(8) and 48(10) of the 2008 Act).

[54] Collectively, these requirements which are under challenge are referred to as "the impugned notification requirements." Mr Lancaster also challenges the failure of the SSHD (or the Secretary of State for Northern Ireland) to publish guidance which would ensure that the impugned notification requirements "were applied and enforced in a way that was compliant" with his Convention rights.

[55] Ms Rafferty has challenged the notification requirements under sections 47, 48, 48A and 49 of the 2008 Act and regulations 3, 4, 5 and 6 of the 2009 Regulations as amended by section 12 and paragraph 51 of Schedule 4 to the 2019 Act; or, in the alternative, the failure of the second respondent to amend or revoke the impugned aspects of the 2009 Regulations so as to ensure they are compatible with EU law and/or Convention rights.

[56] By way of relief, Mr Lancaster seeks declarations to the effect that the decision by the PSNI to seek to enforce the impugned notification requirements against him is unlawful; declarations that the provisions imposing the impugned notification requirements are incompatible with his rights under article 8, article 14 (in conjunction with article 8) and/or article 7 ECHR; and declarations to the effect that the respective Secretaries of State should issue guidance in relation to the impugned notification requirements, in order to ensure they are exercised only in a way which is compatible with Convention rights. In addition, he seeks an order quashing the various legislative provisions setting out the impugned notification requirements insofar as the court is empowered to do so; or declarations of incompatibility under section 4 of the Human Rights Act 1998 in respect of them. Ms Rafferty seeks similar relief, as well as damages.

[57] The grounds upon which Mr Lancaster relies essentially comprise a wholesale challenge to the Convention compatibility of the notification regime based on an asserted breach of his article 8, article 14 and article 7 rights. The article 8 claim is focused on the interference with his everyday life; alleged lack of certainty and predictability; the disproportionate nature of the interference with his rights; and the failure to have any review mechanism in relation to the ongoing requirement for him to be subject to the notification requirements. The article 14 claim is based on alleged discrimination as compared with the impact of the requirements on terrorist offenders in Great Britain. The article 7 claim asserts that the new notification requirements are in the nature of an additional penalty imposed on him in respect of his offending, which were neither in force at the time of his offending or sentencing and in respect of which he had no opportunity to make representations to the trial judge.

[58] As to lack of certainty, the first applicant contends that there is a lack of clarity as to what precisely is expected of him by reason of the new requirements, particularly in relation to notification of travel arrangements, including a lack of clarity on the part of the PSNI as the enforcement authority in relation to how the new arrangements do or should operate; and that this, in conjunction with an absence of official guidance in relation to these matters, represents a further breach of his Convention rights, or is irrational and/or unfair. Mr Lancaster further argues that the impugned notification requirements were a breach of his EU law free movement rights – although the argument on this issue was left to Mr McDonnell's representatives. Finally, there was initially a challenge to the equality screening of the new requirements by the SSHD, in that it was said that this respondent failed to have any or adequate regard to the particular circumstances of RTOs who live in Northern Ireland and thereby failed to take into account a relevant consideration and failed to comply with section 75(1)(a) of the Northern Ireland Act 1998. However, this aspect of the challenge was not ultimately pursued.

[59] Ms Rafferty contends that the foreign travel notification requirements are contrary to articles 4, 5 and 27 of EU Directive 2004/38/EC; and Articles 21 and 22 and Article 56 of the Treaty on the Functioning of the European Union (TFEU). She also contends that the entirety of the notification obligations are contrary articles 5, 6 and 10 of the General Data Protection Regulation, and section 2 of the Data Protection Act 2018. She also relies upon her rights under the Charter of Fundamental Rights of the EU, namely her right to respect for private and family life in article 7, free movement rights under article 45, the anti-discrimination provision under article 21, and the prohibition on retrospective punishment under article 49. This applicant also relied on her Convention rights under article 7; article 8, including on the basis that there is insufficient certainty to the requirements and how they will be applied in practice as to satisfy the quality of law condition; and article 14.

[60] Mr McDonnell challenges the notice issued by the PSNI on 19 April 2019 and also the amendments introduced by the 2019 Act, in respect of which he seeks both declaratory relief and injunctive orders. Mr McDonnell's submissions focused on the absence of individual assessment in his particular case (with restrictions on his rights

arising by virtue of the nature of his convictions and the sentence imposed by the court), along with the absence of discretion or any right of review. A major focus of his case was also the free movement challenge grounded on EU law rights. His case overlapped most substantially with that of Ms Rafferty. Mr Lancaster did not pursue any ground based on data protection law, whereas the other two applicants did.

Summary of the respondents' cases

[61] The respondents contend that the notification regime, as amended by the 2019 Act, remains a necessary, lawful and proportionate response to the grave danger posed by terrorist activity. They contend that the genuine and objective impact of the amended requirements have been over-played by the applicants, with their grounds of challenge based in large measure upon hypothetical scenarios, conjecture, and an unwillingness to properly engage with the requirements. In particular, it was submitted that various contentions on the part of the applicants – for instance, that they could inadvertently travel across the border or might change their plans in such a way that they could not return by the previously notified entry point - were fanciful or far-fetched, or simply indicated an unwillingness to take simple and sensible steps to minimise the risk of non-compliance. One example given was the attempt by Mr Lancaster to provide the necessary details by way of letter when the statutory scheme is clear that personal attendance at a police station is required; or a later occasion, when providing a 'block notification' at the police station where a selection of border crossing points were identified which he might choose from.

[62] It was also submitted that a variety of concerns raised by the applicants were unsubstantiated or based on a lack of evidence (for instance, purported detrimental effects on their mental health in the case of Ms Rafferty in particular, or on their relationships with others). The respondents have conducted an analysis of the travel notifications provided by the applicants after the new arrangements came into force and point out that – leaving aside the flurry of correspondence on Mr Lancaster's part shortly after the new requirements were introduced – the travel notifications on each of their parts were extremely limited. (On one occasion, Mr Lancaster notified an overnight stay in Dublin with another RTO but, generally, has said that he has ceased much or all of his cross-border travel.) Notwithstanding Mr McDonnell's averments, other than a trip to Spain and one to Dundalk – where the police were concerned, he had not given the requisite amount of notice – he did not appear to have been involved in any foreign travel. Ms Rafferty had provided no evidence concerning her engagement with the travel notification requirements. On this basis, the respondents contended that the applicants' complaints were overblown; and that the notification regime was workable, provided the applicants made appropriate efforts to comply.

[63] On the question of the clarity of the regime, the respondents contend that the requirements are clearly spelt out in the relevant statutory provisions; and that sufficient information is available in respect of how the provisions operate, from a variety of sources, to ensure that their effect is sufficiently understood and accessible.

[64] The respondents also rejected the suggestion that the revised notification regime failed to take into account the situation in Northern Ireland. On the contrary, they point to the terrorism threat level in Northern Ireland having been at the level of "severe" at all material times, whereas the threat level in the rest of the United Kingdom was reduced to substantial (a lower level) in November 2019. In addition, the respondents contend that it is settled law that notification regimes may proportionately apply to categories of offenders. The case-law in this regard is discussed below.

[65] In respect of the EU free movement grounds, the respondents contend that there has been no restriction on the applicants' freedom of movement or upon their access to services, nor any discrimination on grounds of nationality.

Contours of the article 8 challenge

[66] The applicants challenge the application of the statutory scheme to them as being in breach of their rights under article 8 ECHR on a number of bases. First, it is contended that the notification requirements are not 'in accordance with law' by reason of being insufficiently clear in their effect. In support of this first limb of the article 8 challenge the applicants rely on a purported lack of clarity on the part of the PSNI, the authority charged with administering and enforcing the requirements, as to their proper interpretation and application. Second, it is said that the notification requirements, in virtually all of their respects, are a disproportionate infringement of the applicants' article 8 rights amounting to a violation of this right. The applicants contend that the respondents have not shown the admitted interference with their article 8 rights to be necessary and proportionate. The respondents accept that there is an interference but contend that this is justified.

The clarity of the statutory scheme

[67] A lawful interference with qualified Convention rights must not only be for a legitimate purpose and proportionate but must also, of course, be "in accordance with law." This is to ensure that individuals are not subjected to arbitrary actions by the State. There are two fundamental components of this requirement: first, the measure complained of must have some basis in domestic law; and, second, the domestic law must be sufficiently precise and accessible for an individual to be able to foresee with a reasonable degree of certainty the consequences of his actions, or the circumstances in which and the conditions on which the authorities may take certain steps (see *Silver v United Kingdom* (1983) 5 EHRR 347, at paras 85-88; and, as to the sufficient precision requirement, *Sunday Times v United Kingdom* (1979) 2 EHRR 245, at para 49). In the present case, it is not in dispute that the impugned notification requirements have a basis in domestic law, through both the 2008 Act (as amended) and the 2009 Regulations. The issue is whether the measures are sufficiently precise and accessible to satisfy the Convention 'quality of law' standard. The applicants submit that "the measures and the accompanying guidance by the PSNI are anything but precise and

do nothing to enable a person… to foresee with a reasonable degree of certainty the consequences of his actions."

[68] Mr Lancaster, for instance, has said that he finds the exact requirements of the new notification measures quite confusing and that he has heard conflicting versions of what is required from different people. He relies heavily upon an assertion that "the PSNI do not themselves know with clarity what is required of [him] in order to comply with the impugned notification requirements." Allied to this is his reliance upon his evidence that the individuals at the police station who took the information from him "were not aware of what was required of him in order to avoid prosecution and were unable to assist him in this regard." For instance, he has provided evidence about being required to attend an interview under caution about an alleged failure to notify police of information required under the 2008 Act (as amended) which arose from an alleged failure to undertake the yearly re-notification of information by way of form CTA1. He attended in January 2020 in order to comply with this requirement and informed the G4S security officer manning the desk about this but was told that she did not know what he was talking about and she did not know what had to be done. She asked him to give his name and address on a blank sheet of paper and told him that she would send it to the relevant department within the PSNI. Months later, at interview, the investigating detective accepted that she had received a sheet of paper with the applicant's details on it in January 2020. The applicant explained that he had attended the police station on various occasions in the interim, including with another friend of his (Mr Harkin) who is also an RTO, in order to assist Mr Harkin with his notification because he has communication difficulties. Mr Lancaster also attended to give notifications about cross-border travel. His evidence is that he "could easily have filled in form CTA1 on any of these occasions." He was told at the end of the interview that the investigating officers would be reporting the matter to the PPS together with a recommendation of 'no prosecution.' He relies, however, on the inadequate procedure when he attended in January 2020.

[69] In turn, the respondents observed that there is no requirement for them under the legislation to produce guidance. Nonetheless, they rely upon the Home Office's publication of a non-statutory circular concerning the 2019 amendments dated 3 May 2019; the detailed explanatory correspondence sent by the PSNI to every RTO affected by the amendments (referred to at paras [43]-[44] above); and the explanatory notes which accompany the legislation itself. Notwithstanding these sources of guidance, the respondents' fundamental submission is that the text of the legislation is clear and precise, making clear what is needed to comply with its requirements.

[70] I accept that the correspondence from the PSNI which has been heavily criticised by the applicants (see para [49] above) does not correctly state the legal effect of the statutory scheme. In particular, in the letter of 9 July 2019, DI Hamlin advised the first applicant that he should "set out as much detail as possible for the reasons you require to travel to the Republic of Ireland." This included, for instance, in an example given in the letter, the name and address of the school a child attended if the purpose of the visit was to collect the child from school, as well as "the times you will

be travelling… and your intended route." Another example included provision of the name and address of a medical facility to which the RTO was travelling for treatment; or the name and address of premises where they purchased goods or services.

[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)).

[72] I consider that any lack of clarity displayed in the PSNI's correspondence in relation to these matters should be resolved by the simple explanation of the legal requirements set out above.

[73] The other area in which it is alleged that the requirements lack clarity is in the extent of the facility to provide a 'block notification' (or the 'single notification mechanism', as referred to in DI Hamlin's affidavit evidence). As Ms Rafferty's representatives submitted, the single notification mechanism does not, in truth, represent any real concession, nor is it a "flexible" interpretation of the requirements. It is simply an acknowledgement that if an individual is aware of the dates, times and location of their intended leaving of the jurisdiction on multiple occasions in the future, they may inform the police of this in the course of one visit to the police station rather than on multiple occasions. This is simply one sensible means of complying with the full rigour of the requirements and does not involve them being diluted in any respect, since there is nothing to preclude an RTO making multiple notifications in the course of one visit to the police station. The police could not in my view lawfully insist on a separate visit being made to the police station in respect of every notification of an intended trip. Insofar as the PSNI considered that they were making some significant concession in accepting multiple notifications in one exchange, where all relevant details were provided in advance in compliance with the 2008 Act and 2009 Regulations, that would have been in error.

[74] Overall, however, I consider the legal effect of the 2008 Act and 2009 Regulations to be clear. The statutory scheme is accessible and sufficiently precise – particularly with the benefit of legal advice – to enable an individual to know what is required of them. What should be done, and when, is spelt out with some granularity. The meat of this case is the question of whether those requirements are justified in Convention terms, *not* whether they are clear, a distinction clearly explained by Lord Sumption in *Re Gallagher's Application* [2019] UKSC 3 at para [14]. This case is not concerned with broad and sweeping discretionary powers, as many Strasbourg 'quality of law' challenges are. Here, the impugned requirements are painstakingly spelt out in statute. It is of particular significance that, in a similar challenge to the specificity of notification requirements relating to registered sex offenders, the ECtHR swiftly dismissed any suggestion that the requirements were not in accordance with law since the measures in question were set out in clear terms under the relevant Act: see *Adamson v United Kingdom* (1999) 28 EHRR CD 209.

[75] The suggested lack of clarity has arisen in two ways. Firstly, the PSNI have, in some correspondence, over-stated what is required. Hopefully any erroneous thinking in this regard, to the extent that it still exists, will be corrected by the analysis above. It likely arose, in my view, from a mistaken belief on the part of the police that 'block' notifications were a concession to RTOs and out of a desire to ensure that such notifications were genuine and not abused or exploited. As discussion with RTOs about how flexibility could be shown progressed, the clarity and simplicity of the PSNI's initial explanation of the requirements in its letter of 12 April 2019 was diluted. In any event, a misstatement of the requirements in correspondence, even from a body such as the police service, is not in itself determinative of the question of whether the restrictions are insufficiently clear to be Convention compatible. Nor is the fact that, at an early stage in the operation of the new requirements, PSNI or civilian personnel were unsure of how the new system would operate in detail, or professed such uncertainty. In fact, the court has been provided with the template pro forma forms for the provision of information which are commendably clear. Obviously, it is incumbent upon the police to ensure that there are those within each police station who are sufficiently familiar with the notification process and appropriately authorised to record a notification when an RTO attends for this purpose. There seems to be some force in the suggestion that this was not always the case when the new requirements were introduced; although there is also force, in my view, in the respondents' point that such confusion could have been minimised if the applicants (or their solicitors) had taken the simple step of making an appointment to attend in order to complete the notification process, so that a properly briefed officer was expecting their attendance and was prepared for this.

[76] Secondly, some element of confusion may have arisen as to the extent to which intended travel can be notified by way of a 'block notification.' That is because there was a focus on *frequent* travel when the key issue is, in fact, the *predictability* of such travel (and, hence, the difficulty with Mr Lancaster's son's irregular Saturday overtime working). Without seeking to attribute any blame for this, some element of uncertainty seems to have crept in during the course of exchanges between RTOs and the police as

the former pressed for accommodations for frequent but unpredictable travel and the PSNI initially considered whether and how this might be done, before it became clear that the statutory requirements did not permit that flexibility. That is not, however, a lack of clarity but a lack of flexibility – which raises separate questions.

[77] The key issues are that the regime is formulated with *sufficient* precision to enable the applicants to regulate their conduct and to foresee, to a degree that is *reasonable* in the circumstances, the consequences which a given action may entail (see para 49 of the *Sunday Times* case). Every eventuality need not be catered for. Moreover, in this case, the regime has been sufficiently set out for the applicants to regulate their conduct. In some cases, notably that of Mr Lancaster, this has been done by taking the decision not to travel (or to travel less frequently) because of the possible consequences of doing so without providing notice or the full notice generally expected by the Regulations. That is an example of the applicant being capable of regulating their conduct in response to foreseeable effects. The inconvenience or disruption to everyday life, in which this results, is again, another matter.

[78] The applicants also assert that the notification requirements in respect of vehicle use are insufficiently certain, largely because of what constitutes ceasing to have the right to use a vehicle. In particular, Mr Lancaster argues that it is not clear, when he assists a relative in having their car repaired and leaves that car with a mechanic, whether or not he must then notify the police that he no longer has the right to use that car. I reject the suggestion that the relevant provisions fail the quality of law test in this regard. Section 47(2)(ga) imposes an obligation to provide "identifying information of any motor vehicle of which the person is the registered keeper, or which the person has a right to use (whether routinely or on specific occasions or for specific purposes), on the date on which [the initial] notification is made." The words used here are straightforward and permit notification of a vehicle which an RTO has a right to use only on specific occasions or for specific purposes. The required information is that which identifies the vehicle. It would be open to Mr Lancaster to notify the police of the details of his relatives' cars which he has a right to use only for the specific purposes he has identified, as and when those purposes arise. If he does not enjoy that right presently – but merely anticipates that it *might* arise in future – it seems to me that there may be force in the respondents' objection that his concern is hypothetical.

[79] Section 48(4C) deals with circumstances where an RTO newly acquires a right to use a vehicle. It provides: "If a person to whom the notification requirements apply becomes the registered keeper of, or acquires a right to use, a motor vehicle the identifying information of which has not previously been notified to the police, the person must notify the police of the identifying information of that motor vehicle." Mr Lancaster is concerned that, having been given permission to use a relative's vehicle for the purpose of having it repaired, he will be in doubt as to whether and when he ceases to have that right, particularly at the point where he has dropped it to the mechanic for repair. Section 48(4E) provides as follows: "If a person to whom the notification requirements apply ceases to be the registered keeper of a motor vehicle the identifying information of which the person has notified, or ceases to have the right

to use such a motor vehicle, the person must notify the police that the person is no longer the registered keeper of the motor vehicle or no longer has the right to use it." For my part, it seems to me clear that if the arrangement is as discussed above (namely that Mr Lancaster has the right to use his relative's car from the time of picking it up from them until it is left back to them after having been repaired) there would be no requirement to notify the police that he has ceased to have the right to use that vehicle once he has left it to the mechanic. That will occur only once the sequence of events for the purpose of which he has been granted the right to use the vehicle concludes. If the right to use the vehicle is dealt with in this way – as a one-off permission *per* repair – I do not see the requirements of the Act as giving rise to any particular difficulty. The more general notification of a right to use certain relatives' vehicles for specific purposes (when they happen to need repaired) is perhaps an even more simple way of dealing with this issue. In any event, I do not accept the applicants' case that these provisions are so unclear as to fail the Convention 'quality of law' test. Some room for application to different facts is permissible, indeed inevitable (see, for example, *Re Cavanagh's Application* [2019] NIQB 28, at para [65]).

[80] The applicants further contend that the notification requirements in respect of the provision of personal financial information are insufficiently certain. This arises principally in relation to a potential re-notification obligation which could be triggered without the applicant immediately appreciating the situation. Where a change to previously notified information is required to be brought to the police's attention under section 48 or 48A, that triggers an obligation to re-notify the required information under section 47(2): see section 48(10) and 48A(8). Again, I consider the applicants' main complaint here to be one of the proportionality of having to re-notify information which has already been notified. That is dealt with below. As to the potential for a notifiable change to occur without the applicant being aware of this (for instance, if a payment card has expired and a new one has been issued), I do not consider this to be an issue of a lack of clarity of the statutory scheme. The financial information to be notified is set out clearly in para 1(2) of Schedule 3A to the 2008 Act. Whether or not there has been a change to any of the specified information is not a matter of complexity. The question of whether an RTO is sufficiently appraised of their financial affairs to be aware of any such change is an entirely separate issue. They can generally be expected to be so aware. However, if an administrative error or oversight leads to a notifiable change occurring of which the RTO is *not* aware, there is provision within the statutory scheme to cater for this. That is because an offence of failing to notify a change is committed, as with other offences, only if there is not a "reasonable excuse" for the failure.

Approach to proportionality generally in this case

[81] It is not disputed that the notification regime does interfere with article 8 rights. The Strasbourg Court has given the concept of private life a broad interpretation, including a zone of interaction with others and the totality of social ties between an individual and his or her community (see, for instance, *Peck v United Kingdom* (2003) 36 EHRR 41, at para 57; and *Üner v Netherlands* (2007) 45 EHRR 14, at para 59). The

most obvious interference arises from the requirement to provide personal information. However, much of the argument in this case related to the interference with article 8 rights arising from the travel requirement notifications. Importantly, these do so *not* by stopping travel – as some of the applicants' submissions appeared to suggest – but, rather, by requiring the provision of information about travel plans (and other matters). Inherent in that requirement is some element of interference with an RTO's private life. Undoubtedly, given that the requirement is to make a notification in person at a police station, there is an additional interference with the individual's freedom of action, within a sphere which I accept to be protected by the article 8 concept of private life, because the type of everyday social interactions and activities which normal citizens might expect to undertake without difficulty requires some additional degree of both planning and inconvenience. Indeed, the respondents did not contend that there was no interference with article 8 rights. The finding that there is such an interference, which requires to be justified, is consistent with the approach of the English court in the *Irfan* case (discussed below) and, indeed, with the approach of the Divisional Court in this jurisdiction in the previous *McDonnell* case (also discussed below).

[82] In relation to the notification requirements arising where a violent offences prevention order has been made, which in some respects are analogous to those which are under challenge in the present proceedings, the Divisional Court in *Re Pearce's Application* [2020] NIQB 23 said this (at para [52]):

> "… the court does not doubt that the statutory notification requirements… are exacting and intrusive. In the abstract they impose certain restrictions on the subject's lifestyle. However, they are designed mainly to ensure effective supervision by the criminal justice authorities of the subject via the duty to provide specified information at the requisite times. They are manifestly designed to promote the public interests of preventing crime, deterring criminality, protecting the rights and freedoms of others and rehabilitating the person concerned. Significantly they do not entail any restriction on the subject's freedom of movement or his liberty generally."

[83] The court was heavily influenced in that case by the fact that – as in this case – all the notification requirements actually required was the provision of information. In that case, partly by virtue of the lack of evidence provided directly by the applicant, the Divisional Court was not even convinced that his article 8 rights had been interfered with (see para [56]); but also expressed the view, even if it was wrong with that, that the impugned requirements were proportionate and lawful (see para [57]).

[84] It is also clear in these cases that the relevant information is obtained and retained in pursuance of a legitimate aim, namely in the interests of national security or public safety; for the prevention of disorder or crime; and/or for the protection of

health or the protection of the rights and freedoms of others. There can be no doubt, in this field of protection of the public from those who have been convicted of serious terrorist offences, and particularly in the context of the ongoing security threat in Northern Ireland, that this corresponds to a pressing social need. As the Divisional Court observed in the *Pearce* case in an analogous field, there is also an overlap between measures designed to prevent re-offending in the public interest and in the private interests of an offender, insofar as such a measure furthers his or her rehabilitation and acts as a deterrent to re-offending into which they might otherwise be drawn (see *Pearce*, at para [51]).

[85] Each party placed reliance to some degree on various aspects of the reports of the Independent Reviewer of Terrorism Legislation (IRTL). For instance, the then reviewer, David Anderson KC, provided a report which was presented to Parliament in December 2016 ("the IRTL 2016 report") about the operation in 2015 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006. He commented that the overall picture was one of "appropriately strong laws, responsibly implemented." The applicants rely upon this to say that the counter-terrorism provisions were working well at that stage and that significant new powers were unnecessary. They also rely on the reviewer's observation that, although he had rejected a false narrative of power-hungry security services, trust needed to be continually earned and that threats to our liberties can come at any time, requiring continued vigilance in the future therefore.

[86] On the other hand, the respondents also relied upon the same report, and in particular on the section dealing with the threat from Northern Ireland-related terrorism (NIRT). It indicated that the threat from NIRT in Northern Ireland remained severe, meaning that an attack is highly likely, commenting that "nobody could describe this as an exaggerated assessment" in the light of statistics which were then set out relating to security-related deaths, security-related casualties and a variety of dissident Republican attacks. Those statistics indicated that, in the period the review was addressing, there had been a murder of a serving prison officer; 36 shooting incidents; 52 bombing incidents; with 14 casualties from paramilitary-style shootings and 58 casualties from paramilitary-style assaults. There were 16 dissident Republican attacks on national security targets during 2015; and the Director-General of MI5 had stated that, in relation to the 22 attacks on national security targets in 2014, for every one of those attacks the police and security services had stopped three or four others coming to fruition.

[87] The similar report provided in January 2018, by the then reviewer Max Hill KC, again indicated that the NIRT threat in Northern Ireland remained severe. A further report provided in October 2018, reviewing the operation of terrorism legislation in 2017 (the report which immediately preceded the 2019 amendments to the 2008 Act) contains a number of portions which were drawn to my attention in the respondents' submissions. For instance, in EU countries, Europol had reported a total of 205 failed, foiled and completed attacks reported by nine EU member states (up from 142 attacks in 2016). More than half of these (107) were reported by the United Kingdom, 88 of which were acts of NIRT – which may be thought to indicate that Northern Ireland-

related terrorism is amongst the most prevalent faced by EU member states. The next highest was France, which reported 54 attacks, and after that was Spain with 16 attacks, and Italy with 14 attacks. In the relevant period for that report, there were two security-related deaths in Northern Ireland; with 58 shooting incidents and 29 bombing incidents; and 28 casualties resulting from paramilitary-style shootings, almost all of which were carried out by Republican paramilitaries.

[88] The respondents relied upon these matters to evidence the fact, which I accept, that there remains a cohort of determined terrorist offenders in this jurisdiction who are intent on threatening life, limb and property. The State is entitled, indeed required, to take steps to mitigate against the murderous intent of terrorist organisations and would-be terrorist offenders. Moreover, the ECtHR, in cases dealing with powers designed to combat the terrorist threat in Northern Ireland, has previously accepted that "the struggle against terrorism may require a particular measure of sacrifice by each citizen in order to protect the community as a whole against such crimes": see, for instance, *Murray v United Kingdom* (1995) 19 EHRR 193, at paras 81-82, citing the court's earlier decision in *Brogan and Others v United Kingdom* (1989) 11 EHRR 117. In my view, a fortiori that must apply to those previously convicted of serious terrorist offences, such as the applicants in these cases. It is against this background that I examine the proportionality of the impugned measures in these proceedings.

[89] I have also found assistance in the decision of *R (Halabi) v Southwark Crown Court* [2020] EWHC 1053 (Admin). Although far from being on all fours with the present cases, this authority considered the approach to be taken on a proportionality challenge to a notification regime and, at that, one which was automatically imposed as is the case with the requirements of the 2008 Act. (Although *Halabi* concerned the making of a notification order by a court, where the relevant statutory conditions were met the court had no discretion.) The Divisional Court considered that a precautionary approach was justified, given the degree of uncertainty about offenders' future behaviour; but also, that in light of this, the proportionality of notification requirements had to be judged by reference to their general effects, rather than the effect on individuals. Some system of monitoring and risk assessment was required, even after a sentence had been served, if potential victims were to be protected by the State. That case concerned notification requirements in respect of sexual offenders; but the principle in relation to the approach which should be taken by a court reviewing the requirements of a notification regime is of broader application. In assessing the proportionality of notification requirements in this way, the Divisional Court in *Halabi* approved and followed a decision from this jurisdiction, namely that of Kerr J in *Re Gallagher's Application* [2003] NIQB 26. Each of these authorities is discussed in further detail below.

Proportionality: cross-border travel

The nature of the interference

[90] With the exception of banking details, addressed separately below (see paras [138]-[140]), and some contact details, the information which is required to be notified to the police pursuant to the 2008 Act are not matters of particular sensitivity or in respect of which a reasonable expectation of privacy is likely to arise. Certainly, in respect of travel arrangements, there is no particular sensitivity or privacy attaching to the fact that one of the applicants is travelling across the border on a certain date. That is something which might well be readily observable to a member of the public or someone who knows them. I do not consider the mere fact of an RTO having to share limited information about their travel plans as being a significant intrusion into their private or family life.

[91] The key objections raised by the applicants in this regard relate, firstly, to the need to attend at a police station to make the notification and, secondly, to the notice which is required to be given. These amount to concerns about the inconvenience of personal attendance and the impact on spontaneous travel planning which the notification requirements entail.

[92] There has been a considerable amount of evidence provided by Mr Lancaster about how long it does or may take to provide a relevant notification at the police station:

(a) As mentioned above, in his grounding affidavit Mr Lancaster estimated this as taking around 45 minutes, although that was inclusive of travel to and from the police station.

(b) In his first affidavit in these proceedings, Mr Lancaster's solicitor, Mr Shiels of Madden & Finucane, gave details of an attendance at the police station on 17 July 2019. On that date, he attended at Strand Road Police Station with the applicant and another individual who is also a client of his who is subject to notification requirements. They arrived at approximately 2.00 pm. Mr Shiels avers that he explained to a civilian (G4S) employee working in the enquiry office that the applicant and the other individual were attending to provide the additional information required under the 2019 Act. All three of them took a seat in the enquiry office and waited for the G4S employee to call them into a small consultation room. All three of them entered the room together and the civilian employee produced a pro forma questionnaire and recorded the information from the applicant and the other individual. At no stage throughout this process was a police officer present. Mr Shiels says that it took approximately 35 minutes for the applicant and his other client to provide the necessary information. The G4S employee then scanned the forms and returned the originals to the applicant and his other client. Copies of these forms have been exhibited to Mr Shiels' affidavit.

(c) Mr Shiels has also provided information about his attendance at the police station with Mr Lancaster on 7 August 2019. On this occasion they arrived at the station enquiry office at 12.12 pm. There was a civilian G4S employee at the

enquiry office and they told him they were attending in order to provide the PSNI with information which had already been provided in writing (by the letter of 31 July 2019). At 12.19 pm they were called to the desk by the G4S employee who advised them that the only consultation room in the enquiry office was being used. He invited them to provide the information at the desk; but the applicant declined to do this as it was a public area and there was another member of the public present who would be able to hear everything he said. They therefore took a seat and again waited. A variety of other members of the public arrived in the meantime. At 12.32 pm the consultation room became free and the G4S employee called them in. They advised him that they had previously attended on 17 July 2019 and he remembered them. They told him that they were there to give notice of intended travel across the border and explained that this has already been provided in writing. Mr Shiels avers that the G4S employee appeared to be baffled and shook his head at the requirement that this information be re-notified orally. He said that he would be raising this with Det Sgt Henderson of TIU because it was "awful and a nightmare", pointing to the busy enquiry office, adding that there was no need for this. He then began noting the information on the form. Again, the form was scanned and the original returned to the applicant. Mr Shiels and his client left the station at 12.48 pm.

[93] This evidence is obviously designed to draw attention to concerns the applicant has about the notification process. I did not find it particularly helpful in determining how quickly a simple notification of an instance of cross-border travel could be made. The attendances referred to above relate to an early stage of the new requirements having been introduced and either notification of a range of information required under the 2008 Act (as amended) or discussion of a 'block notification' designed to cover a range of instances of cross-border travel. Such notifications might be expected to take longer than notification of the very limited information required for a simple cross-border trip (see para [71] above). Some time will inevitably be required to speak to a relevant officer or member of civilian staff if the enquiry office is busy and, perhaps, to secure a consultation room if the RTO wishes only to provide the information in a private setting. In circumstances where Mr Shiels attended with two clients on 17 July 2019 to provide information and this took 35 minutes, and where his attendance with Mr Lancaster only on 7 August 2019 required no more than 16 minutes in the consultation room, I am satisfied that a notification of some complexity can be made within 15-20 minutes. A simple notification of a cross-border trip could likely be made considerably more quickly than that.

[94] I accept that some time will be required to attend the station and, perhaps, to await being attended to. In the scheme of things, however, these are not major commitments and are comparable (at least in terms of time commitment) to a range of everyday tasks which people frequently undertake, such as picking up a prescription, undertaking a banking transaction in the branch, or posting a letter by special delivery. It was also significant that the applicants had not made a pre-planned appointment to attend with an officer who was familiar with the purpose for which they were

attending. The PSNI have suggested that this is another way in which the process could be streamlined if the RTO in question indicated to the TIU that they were intending to attend a particular station at a particular time in order to make a notification. In those circumstances, the process is likely to take a shorter period of time.

[95] I consider Mr Lancaster's complaint that attendance at the police station may inappropriately alert others to his conviction to be a weak point. This is not a "private detail about him", as suggested at one point in his grounding affidavit. His conviction is a matter of public record and, like most if not all terrorist convictions, will have been the subject of media reporting at the time of his trial and sentence.

[96] It is also clear that there is no need for an RTO such as Mr Lancaster to take family members with them to the police station if and when they are required to give a notification. Several of his concerns relate to the purported requirement for him to take such persons to the police station with him and the consequent effects that may have upon them. Any decision to bring another family member to, or into, the police station in these circumstances is a matter of choice on the part of both the RTO and the family member concerned. The requirement of advance notice being given means that it ought to be rare that the notification is being made at the same time as the trip to which it relates.

[97] Turning to the impact of the requirements on travel plans, the main difficulty for the applicants is that the regime limits the spontaneity with which they may travel or the capacity for last-minute changes of plan. The inability of the block notification proposal to cater for *potential* travel is indicative of this issue. Where travel on a certain date is known sufficiently in advance, the requirements of the scheme are straightforward and unproblematic (other than the inconvenience factor discussed above). The respondents have effectively conceded that there is an issue with spontaneous travel. The evidence of Mr Kane (a Home Office policy official working within the Office for Security and Counter-Terrorism) for the second respondent suggests that, for those who live close to the border and travel over it frequently, they may be required to "amend… previous habits and make arrangements to visit relatives, regularly or otherwise, with seven days' notice or more."

[98] Mr Lancaster's case is one in point. His evidence is that he has in effect stopped travelling across the border for short visits because he views the notification requirements as unworkable. This, he submits, represents a significant interference in his private and family life. Similarly, he no longer takes his son to work but, rather, takes him to the border from where his son either organises alternative transport or walks to work. However, these are matters of *choice* for the applicant. It is not, as the applicant has submitted, that he is "unable" to transport his son to work or to travel to Donegal to visit family members and friends. He is not, as he has contended, denied the ability to engage in leisure or social activities in County Donegal. Rather, he has chosen not to do so because he is unable or unwilling to arrange his affairs with the required foresight to ensure compliance with the notification requirements (or to take

the risk of prosecution if he provides less than the required notice and is thereafter shown not to have had a reasonable excuse for having done so). With some element of pre-planning, however, all of the purposes for which regular cross-border travel is undertaken are achievable. The restriction on last-minute planning is the key impingement introduced by the statutory scheme, in my view.

[99] Yet the requirements of the 2008 Act and 2009 Regulations are not entirely inflexible in this regard. First, regulation 3(b) provides that a person must notify as much of the information there set out *as the person holds*. There is some flexibility therefore in providing details about the location in which they intend to stay for the first night outside the UK, the date of return and the point of arrival back in the UK, where those details are not immediately known. Second, the requirements of section 52(2) are less prescriptive, requiring notification only of the date on which the person intends to leave the UK, the country to which they will travel and the point of arrival in that country. A trip over the border can be notified for a particular date and via a particular route without having to specify either the time of day when it will be undertaken or to where the RTO will be travelling, much less the purpose of the trip. There is also a requirement – although this might also be viewed as a facility – to update the notification where previously planned travel is abandoned or where the notified details change, up to 12 hours before the date of intended departure (see regulation 4(2) and 4(4)). When a trip has been notified, the RTO is free (within the bounds of the law) to do whatever they want when they have crossed the border, without any additional notification requirement, provided they return on the date and at the arrival point previously notified. They can change the purpose of their trip or their intended destination(s) without difficulty, provided they return on the notified day and by the same arrival point.

[100] The last-minute requirement or emergency situation is catered for in a number of respects. In the first instance, provision is made for a lesser period of notice than the usual seven days being provided. Where there is a reasonable excuse for this, albeit that the notification must still be given as soon as practicable, there is leeway up to 12 hours before the date of departure. Indeed, this can be done up to any time before the person's departure where there is a reasonable excuse for this and where the information is notified as soon as practicable (see regulation 4(3) and (4)). There is of course also the requirement, before any prosecution for breach of the notification requirements was instituted, for the prosecutor to consider the public interest test. The court would hope that a common sense approach to that test would be taken in circumstances of genuine urgency.

Legitimate aim and assessment of proportionality

[101] In terms of notification of cross-border travel, the information which has to be provided under the statutory regime is the same as applied when the 2008 Act first came into force. The issue is essentially that *more trips* will now be caught by the requirements, since they now apply to all cross-border travel and not only those of three days or more. The rationale for the increased notification requirements in respect

of travel especially was expressed in the impact assessment which was carried out by the Home Office, in the following terms:

> "At present an RTO is only required to notify the police of overseas travel lasting three days or more. This is open to exploitation as it would enable an RTO to travel overseas for periods of less than three days to engage in terrorist activity. Requiring an RTO to notify the police in advance of all foreign travel would provide a comprehensive picture of when an RTO is travelling outside of the UK, allowing police to complete relevant checks, identify any risks, and take any mitigating action required."

[102] There is evidence that the Secretary of State consulted with the PSNI in advance of the introduction of the legislation, although the applicants rightly observe that the evidence about that consultation is limited. It appears that the PSNI indicated that they would work with those persons impacted in order 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. For the reasons discussed above, that is possible if the travel is regular and predictable. Issues arise in respect of spontaneous travel but it is also plain that if the statutory scheme is to be effective for the reasons mentioned above, any opportunity to evade the requirements, which could be exploited by those with nefarious intent, must be reduced.

[103] The evidence on behalf of the PSNI is that they consider the additional and amended requirements as "necessary for the purposes of public protection in order to (a) act as a deterrent to RTOs engaging in further terrorism related activity (for the duration of their requirements); and (b) to establish such information as is necessary to effectively monitor and investigate the activity of RTOs, where required, in order to minimise the risk of further terrorism related activity (for the duration of their requirements)." It is further averred that the enhanced requirements are viewed by the PSNI "as significantly improving its ability to deliver those public protection objectives." The applicants are critical of the fact that the PSNI evidence in this regard is not supported by an underlying strata of empirical evidence or data. They also point out that, during the consultation phase in relation to the 2019 amendments, there is a lack of contemporaneous assessment by the police in this jurisdiction as to how the new provisions would make a material difference in Northern Ireland cases. These are respectable forensic points but, in my view, miss the wider picture for the following reasons:

(i) First, the PSNI is an expert and highly experienced body in this field, whose judgment on the issue is worthy of careful consideration.

(ii) Second, for a variety of reasons one would not expect a detailed explanation of how the previous notification requirements had or had not thwarted terrorist plans; nor how the increased requirements introduced in 2019 would do so or

have done so. There is an understandable sensitivity about disclosure of such intelligence-related matters and the PSNI evidence in these proceedings was clearly crafted with a view to non-disclosure of information or details which may undermine their operational effectiveness in disrupting terrorist operations.

(iii) However, third, once it is accepted (and this is not challenged) that there is a risk of travel outside the United Kingdom being used to facilitate terrorist activity, there is an obvious logic to the propositions (i) that law enforcement authorities will be better placed to meet that risk when they are aware of terrorist offenders' intentions to travel, and (ii) that the facility to travel for up to two days without having to make any notification leaves a gap in preventative knowledge and capacity.

(iv) Fourth, the general assessment relied upon by the PSNI is obviously shared, in comparable though not identical circumstances, by other law enforcement agencies throughout the UK who supported the introduction of the increased requirements.

(v) Fifth, the IRTL in a variety of reports has drawn attention to the importance of post-release monitoring of RTOs in preventing further terrorist offending.

[104] I accept the applicants' case that, by reason of the ease and frequency of travel over the land border on the island of Ireland, the notification requirements have, or are likely to have, a greater adverse effect on RTOs resident in Northern Ireland, and in particular those who live close to the border. This factor should not be over-estimated, however. There will be many RTOs who live in Northern Ireland who do not travel across the border frequently. (The respondent's evidence was that, as of the date of DI Hamlin's first affidavit, of 42 RTOs living in the community in Northern Ireland, only 18 live within 10 miles of the border). There may also be those who live near the border who have little occasion to cross it or, at least, are happily able to do so with greater pre-planning than the present applicants. Indeed, the respondents' submissions emphasise that the second and third applicants have evinced very little intention to travel across the border in recent times. In addition, there may be RTOs who live in the rest of the UK who have occasion to travel frequently outside the jurisdiction. The availability of a rail link between London and Continental Europe has significantly increased the convenience with which such trips can be made. Nonetheless, it is obviously easier to travel to and fro across the border between Northern Ireland and the Republic of Ireland.

[105] By the same token however, this very ease of movement may be a cause for concern for the authorities. Just as it is easier for a citizen to travel across the border for legitimate purposes, so too is it easier for those who may wish to exploit this facility for illegitimate purposes. Put simply, with increased ease of cross-border travel comes increased risk, once it is accepted (which is the premise upon which the statutory

scheme operates) that travel between jurisdictions is a means by which terrorist organisations operate.

[106] The IRTL 2016 report contained the following observations (at para 2.13(c)):

> "Dissident Republican groups retain access to a range of firearms and explosive materials. Despite good cooperation between the PSNI and An Garda Siochánά, terrorists (who often engage in other illegal activity such as smuggling) can move with relative freedom over the border with the Republic of Ireland. As Europol reported in 2016, the Republic is used for fundraising, training, engineering, procurement, storage and, occasionally, as a preparatory base for attacks in Northern Ireland."

[107] That experience provides a sound basis for the authorities in the UK wishing to monitor cross-border travel on the part of RTOs. The report of the then IRTL, Jonathan Hall KC, in March 2020 ("the IRTL 2020 report") dealing with the operation of the terrorism legislation in 2018 recorded that, as a result of NIRT, two civilians had been killed and, as before, there was a wide range of shooting and bombing incidents. Of the 60 security incidents reported by the UK to Europol, 56 were incidents in Northern Ireland. The IRTL again recorded that, in 2018, despite good cooperation between the PSNI and An Garda Siochánά "terrorists (who frequently engage in other unlawful activity such as smuggling) can move with relative freedom across the border with the Republic of Ireland."

[108] Notwithstanding concerns of that nature, the evidence suggests that the applicants are right to suspect that, when the changes made by the 2019 Act were under consideration, searching analysis was not undertaken in relation to the effect that they may have in this jurisdiction for those who regularly travelled across the Irish land border. The main impetus for the reforms appears to have been concern in relation to the operation of Islamist terror groups in Great Britain, in the wake of atrocities such as the Manchester Arena bombing and other attacks in London. However, the mere fact that this aspect of the operation of the legislation in Northern Ireland was not probingly considered is not itself a reason for concluding that the legislature has acted in a way which is disproportionate. This might be relevant, to some degree, to the respect the court will pay to the legislature's discretionary judgment; but it is now well established that the decision-making process is not determinative of whether or not Convention rights have been violated. That is a question of substance rather than process.

[109] In any event, it is also important not to ascribe this factor undue weight. The respondent's evidence, which I accept, is that, from around the summer of 2017, the PSNI participated in discussions relating to the proposed introduction of amendments to the notification regime through the 2019 Act. Their views were actively sought and considered. Other Northern Ireland stakeholder agencies, such as the Department, the

PPS and the NIO were also engaged. In particular, the Home Office was advised that the new measures could potentially be of benefit in reducing the likelihood of re-engagement in terrorism-related activity of offenders after their release; and that increased requirements "could deliver enhanced intelligence dividend leading ultimately to better investigative outcomes and disruptions." The police service here was supportive of the proposed changes and also indicated that they would work with those persons impacted to ensure that the new requirements would not impact upon them significantly as regards travel outside the UK. They wished to soften the impact on RTOs; but that does not undermine the efficacy of their receiving the information required under the amended notification requirements, which they also drew to the attention of the Home Office. The exchanges show that the PSNI raised the fact that the enhanced foreign travel requirements may have a greater impact on RTOs living within border areas, so the Home Office was not unsighted as to that factor. The PSNI also engaged with its UK policing partners to ensure a coordinated approach.

[110] The respondents' position before the court is that they consider the amendments as being necessary for the purposes of public protection, partly as a deterrent to RTOs engaging in further terrorism-related activity for the duration of the requirements but also to assist in effectively monitoring and investigating the activity of RTOs where required in order to minimise the risk of further terrorism-related offending.

[111] As it happens, there has historically been an element of terrorist groups on the island of Ireland exploiting the border for their purposes in a variety of ways. The IRTL report referred to at para [106] above gives a pithy summary of some of the ways in which this occurred. The increased risk which arises by virtue of the presence of the border and the ease with which it may be traversed is a material factor which may be thought to increase the need for the notification requirements in this jurisdiction, as opposed (for instance) to travel outside the United Kingdom from Great Britain where detection is likely to be easier. The applicants are, of course, correct in pointing out that travel to the Republic of Ireland is not indicative of travel to a state which sponsors violence. However, the evidence of DI Hamlin on behalf of the PSNI, is that "cross-border activity is considered to be a relevant factor within the risk-management of terrorist related activity within NI." He describes this as a "well-established position" which is not dictated by the fact that, on the particular facts of an individual conviction, an RTO has not been convicted of terrorist activity shown to have (on that occasion) involved a cross-border element.

[112] The evidence provided by DI Hamlin is that travel between this jurisdiction and the Republic of Ireland, including for periods of less than three days, has consistently been assessed as being a relevant feature of terrorist-related activity within Northern Ireland and of the attempts of those responsible to conceal such activity from the attention of law enforcement agencies. A range of concrete examples of this – drawn from information already within the public domain by reason of convictions having been secured in the last 10 years – are provided in his affidavit. These included planned shooting and bombing attacks where cross-border travel was a feature of the

planning or conduct of the terrorist operation. The evidence also makes specific mention of the murder in 2012 of a serving prison officer, David Black, in which the vehicle used in the murder travelled into Northern Ireland from the Republic of Ireland. DI Hamlin also points out that the additional travel notification requirements improve the PSNI's ability to take immediate action in respect of any suspected breach of the requirements at the actual time of the RTO's intended departure (for example, if an RTO is stopped at a vehicle border checkpoint and it appears that no notification has been given), when it would previously have been much harder to ascertain if an RTO was intending to breach the requirements.

[113] The monitoring of RTOs for the purpose of the prevention of further terrorist offending pursues an important legitimate aim; as does the modification of the travel notification requirements brought about by the 2019 Act which sought to 'plug the gap' left by there previously having been significant opportunity for cross-border travel of which the authorities may have been unaware. The need for such measures is in my view heightened where a border may be crossed with ease and with otherwise limited risk of detection or knowledge on the part of the authorities, all the more so where this is an established feature of the operations of terrorist organisations.

[114] Ms Rafferty's representatives argued that there were good grounds to conclude that the requirements were imposed for an illegitimate aim, namely ministers' desire to bring convergence between outcomes in terrorism cases across the UK, whatever the nature of the terrorism. This is based on a reference contained within correspondence exhibited to Mr Kane's affidavit evidence. The applicants argue that no practical benefit is identified from applying a cross-UK regime. I do not accept this argument. First, it is clear from the evidence before the court that the legitimate aims referred to above were and are the justification relied upon by the SSHD when promoting the legislation and of both respondents in defending it. It also cannot be assumed that there is no practical benefit in a consistent notification regime being applied across the UK or that it would be illegitimate for government to desire such consistency in a non-devolved matter of this nature; but, in any event, this was but one consideration discussed during the course of the development of the 2019 Act. Fairly viewed, it was by no means the sole or main reason why the amended requirements were extended to Northern Ireland.

[115] I reject the specific submission advanced on behalf of Mr Lancaster that the collection and retention of the information required in his case is not proportionate because (as he submits) his offending did not involve cross-border travel, the use of a false identity, the use of a vehicle or any financial transactions. The notification requirements are imposed only upon those who have been convicted of a terrorism offence or an offence having a terrorist connection and who, as the result of the commission of such an offence, have had imposed upon them a significant custodial sentence. This factor provides important context to the operation of the statutory scheme. It is directed only towards known offenders who have been demonstrated (to the criminal standard) to be prepared to break the law in a way which supports or assists those committed to terrorism. The requirements may apply to a range of

different types of offenders, up to the most committed of terrorists; but the mere fact that prior offending has (for instance) not involved the use of a vehicle does not mean that the RTO in question may not seek to commit further terrorist offences by that means in future. Indeed, on one view, a convicted offender who remains committed to terrorism is likely to reoffend in future in a way *other* than that which saw them successfully apprehended and prosecuted in the past. There is no need in my view for a nexus between the nature of an RTO's conviction and the subject matter of the notification requirements imposed upon him or her. The necessary nexus exists between the commission of the terrorist or terrorist-connected offence (here used as a proxy for support or sympathy for terrorism or a terrorist organisation) and the State's legitimate desire to thwart future acts of terrorism.

[116] Mr Lancaster's case is also that the requirements which are imposed upon him are disproportionate to the offence for which he has been convicted. His case in this regard is attractively presented, and can be so, because of the limited nature of his offending. He was convicted of one offence only, which did not involve any violence; and, although he was sentenced to a term of imprisonment, the sentencing judge was persuaded that this term could be suspended. Nonetheless, he has been convicted of an offence which is a specified terrorism offence for the purposes of the 2008 Act and which can properly be described as indicating support for a proscribed organisation (even if only on one occasion). As the *Gallagher* and *Halabi* authorities show, it is the proportionality of the statutory scheme which requires to be assessed. Mr Lancaster's case may be thought to fall at the margins of the regime; but it is caught by the basic features of the notification scheme described in the previous paragraph. Some concession is made to the relatively short period of the sentence imposed in his case by virtue of the fact that he is subject to the notification requirements for the shortest period available under the 2008 Act. This is an important consideration in assessing the proportionality of the requirements in respect of him, in my view.

[117] I return to the question of possible review of the application of the notification requirements later in this judgment. However, I consider that the legislature was entitled to adopt a graduated scheme which operates principally by reference to the length of sentence imposed by the sentencing court, once the threshold for the application of the scheme has been reached. As noted above, that threshold includes conviction for a terrorist offence (or an offence having a terrorist connection) where the custody threshold has been met and a significant custodial sentence (of 12 months or more) has been determined to be merited.

[118] Dealing with a discrete point raised by Mr McDonnell, I also do not consider the mere fact that no recall has occurred during the period when he had been released from prison but remained on licence to be in any way determinative of the proportionality of the notification requirements to which he was subject. During that period he will have been subject to his sentence and licence supervision. The simple fact that he was not subject to recall at that time does not equate to an absence of risk of re-offending in the future. As a number of cases which are discussed further below suggest, the unpredictability of further terrorist offending, coupled with the

potentially dire consequences of a successful terrorist attack, justify a precautionary approach being taken in this regard.

[119] More generally, the Strasbourg case law is clear that, in relation to the proportionality of interference with qualified rights, it is for the national authorities to make the initial assessment of the pressing social need in each case and that contracting states have a certain margin of appreciation. In the field of national security, the court will exercise a less intense scrutiny than in other areas. In the domestic sphere, this translates to the breadth of the appropriate area of discretionary judgment, particularly in relation to the question of whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective (see, in respect of this criteria, the observations of Lord Reed at para [75] of his judgment in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39).

[120] In addition, authority also requires that, in deciding whether an appropriate balance has been struck between the rights of the individual and the interests of the community, the 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" (see Lord Hope in *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3, at para [74]). Although some details of the travel notification requirements are left to be dealt with by way of regulation, all of the other impugned provisions are set out in primary legislation which was debated and scrutinised in full by Parliament. With regards to travel notifications, the basic features of those requirements are also set out in the 2008 Act in section 52. The view of the legislature that these measures were both appropriate and required should be given considerable weight.

The different approach to registered sex offenders

[121] In their challenge to the proportionality of the requirement to notify all cross-border travel, the applicants have relied heavily upon the distinction between the notification requirements for RTOs on the one hand and registered sex offenders (RSOs) on the other. Whilst RSOs in England and Wales must notify *any* travel outside the UK to police, RSOs in Northern Ireland only need to notify travel to the Republic of Ireland where it is for a period of three days or more (essentially, the equivalent to the requirement upon RTOs before the 2019 amendments).

[122] The Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004 were replaced in 2012 by the Sexual Offences Act 2003 (Notification Requirements) (England and Wales) Regulations 2012 – which apply only in England and Wales – which meant that travel notifications for RSOs were required for *all* travel outside the United Kingdom and not merely travel for a period of three days or longer. It was initially intended that this type of regime should also apply to RSOs in Northern Ireland. A Bill Paper was prepared for the Northern Ireland Assembly in this regard. The Department of Justice's view was that a requirement on the part of RSOs resident in Northern Ireland to notify all travel to the Republic of Ireland would be unworkable.

The stakeholders consulted by the Department acknowledged the difficulties of requiring such notification for cross-border travel. When the Bill came before the Assembly, the then Justice Minister (David Ford MLA) proposed only that RSOs be required to notify travel to the Republic of Ireland where they intended to leave the UK for a period of three days or more (although any travel outside the UK *other than* to the Republic of Ireland would still require to be notified). In an Assembly debate the Minister said this approach was "necessary to allow for those who routinely cross the border – for example, to visit a relative – or those who commute to work there."

[123] In his affidavit evidence, Mr Kane has suggested that a reason for the different approach to RTOs, as opposed to RSOs, is because of the lower number of RTOs involved (together with the PSNI's commitment to taking a pragmatic approach to manage the issue with RTOs who travel frequently). The applicants argue that there is no contemporaneous documentation supporting this as having been identified as a reason for the difference in approach. That may be so; but it is a factor relied upon by the respondents now and a consideration which I am prepared to accept would have been an obvious factual matter within the knowledge of the respondents at the time when the legislation was being progressed. Moreover, Mr Kane's evidence indicates that this issue was considered in summer 2018 when Northern Ireland political parties were briefed on the proposed 2019 Act and raised the issue of how the RSO regime operated, which was then looked into by the Department. As a matter of fact, there are far more RSOs than RTOs in Northern Ireland. The question of the workability of travel notification requirements raises issues about the authorities' capacity to cope with them, as well as that of the individual offender. (In terms of numbers, the respondents' evidence indicated that, as of 15 May 2020, there were only 53 RTOs residing in Northern Ireland, including those in custody as well as those in the community. Although the number of RSOs changes regularly, as at 21 April 2020 there were 1,626 such offenders.)

[124] Additionally, courts have previously recognised that terrorist offending and sexual offending are different. This was perhaps most clearly expressed in an analogous context to the present by Maurice Kay LJ in his judgment in *R (Irfan) v Secretary of State for the Home Department* [2013] QB 885, at para [12]:

> "Terrorism is different from sex offending. Notwithstanding the seriousness of sex offending, terrorism offences have unique features which compound concern. A single act can cause untold damage, including loss of life, to a large number of people by someone motivated by extreme political or religious fanaticism. If anything calls for a precautionary approach, it is counter-terrorism."

[125] These observations were made in the context of approving an even more fulsome explanation given in the Divisional Court below, by Laws LJ, of why terrorist offending is regarded as having characteristics which sets it apart from other

offending, in relation to its motivation, effects and unpredictability. A further instance of this distinction being recognised is found in *R (Khan) v Justice Secretary* [2020] 1 WLR 3932, at paras [77] and [80], in which the Divisional Court again recognised the high level of danger posed by terrorist offenders, which might not be reflected in the offences for which sentences have been imposed, because of the ideological and unpredictable nature of their offending, as well as the disparate identity of their potential victims.

[126] As already highlighted, cross-border movement is also a known feature of NIRT in this jurisdiction in a way which is not the case with sexual offending (although there is plainly also an incentive for RSOs to seek to exploit travel to other jurisdictions if they are intent on re-offending). Ms Murnaghan submitted that there is no comparable concern on the part of the authorities as to RSOs exploiting the border.

[127] Because of the different nature of terrorist offending from sexual offending, the additional cross-border element of terrorist offending here and the lower number of offenders involved, 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. In any event, the respondents make the blunt point that this is an excepted matter (see para 17 of Schedule 2 to the Northern Ireland Act 1998) so that, on one view, the potential approach of the Assembly to it is an irrelevance. The democratic institution with responsibility for this matter – Parliament – has made its decision. For these reasons, I do not consider the different regime applicable to RSOs to be determinative of the question of proportionality of the travel notification requirements which are the subject of these proceedings.

Conclusion on proportionality re travel notification requirements

[128] Drawing together the threads discussed above, I hold that the scheme of the travel notification requirements is proportionate. Objectively, they appear to me to have a modest impact on the second and third applicants in light of the paucity of evidence from them about regular travel to the Republic of Ireland. In the case of the first applicant, the effect is more substantial. However, I consider there to be force in the submission on the part of the respondents that the effect upon Mr Lancaster has been over-elaborated to some degree. Ultimately, he is subject to some inconvenience in relation to travel plans, whether by reason of having to attend at the police station in order to make notifications or by reason of having to reduce the spontaneity with which he engages in cross-border travel. However, these are capable of being managed and reduced if the applicant is willing to travel with greater regularity and predictability. Many of the instances where he wishes to travel (such as to GAA or football matches) will be predictable. Other frequent travel (such as to fill up on petrol or visit relatives) may simply have to be undertaken with greater uniformity. There is no prohibition on family visiting the applicant in this jurisdiction; and, importantly, no prohibition on his travelling, provided the requisite notice is provided (or reduced notice where there is a reasonable excuse for this).

[129] Moreover, authority shows that it is the effect of the scheme *in general* which is important, rather than the impact on an individual, much less the impact on an individual who may be thought to represent one of the 'hard cases' which always arise where lines are drawn. Parliament has determined that the required information should be provided in order to fill a clear gap in the authorities' ability to monitor RTOs which arose in the pre-2019 regime. In principle, subject to the further discussion below, that is an entirely legitimate and proportionate requirement in order to reduce the risk of further terrorist offending. I accept that the aim of closing the two-day foreign travel opportunity for RTOs for reasons of public protection was a legitimate aim, particularly in Northern Ireland where, as discussed above, cross-border travel is a recognised feature of terrorist offending and operations. 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, unless the aim of the new requirement is entirely undermined; and law enforcement agencies obviously require reasonable notice of RTOs' plans in order for the intended operational effectiveness of the scheme to be delivered. I consider that the scheme strikes a fair balance between the interests of the community and the rights of the applicants. As indicated above (see paras [88] and [115]), the protection of the public from terrorist campaigns requires some restriction on qualified Convention rights, all the more so in respect of those who have been convicted of serious terrorist offence.

[130] I have considered carefully the question of whether it is proportionate to require attendance at a police station when a travel notification is being made. I am entirely satisfied with this being required in relation to notifications of the other information required under the 2008 Act, which are likely to arise much less frequently. The requirement that that information be provided in person is set out in primary legislation: see section 50(2). It is imperative that the authorities are assured that the right person is providing the information (which is the reason why provision is made for verification of the person's identity: see section 50(6)). It may also be relevant for monitoring purposes for the police to know if the offender has radically altered their appearance in some way.

[131] The same requirement is *not* imposed by the 2008 Act itself in relation to travel notifications. The means of notification for those purposes is left to the regulations to be made by the SSHD: see section 52(4). The requirement to attend at a police station in order to make a travel notification is then set out in regulation 6(1) and has not been mandated by Parliament itself. It represents a judgment on the part of the second respondent. I am also conscious that, in a similar scheme for terrorist-related offenders who remain on licence (discussed in *Re Mackle's Application* [2023] NIKB 13) approval for cross-border travel must be obtained from the PSNI but that, in that context, there is no need for personal attendance. In one respect, that regime is more strict: permission is required. In another it is less strict, since in-person notification is not required.

[132] I can quite see why RTOs would prefer not to attend at a police station in order to provide the required information. I do not accept the speculative suggestion on

their part that this will cause others to suspect that they are acting as some kind of informant. This appears to me to be far-fetched. Anyone providing information in that way is likely to do so by much more covert means; and the requirement to attend is easily explained by reference to the statutory scheme under consideration. If there was force in this submission, it would apply equally (for instance) to bail conditions requiring regular attendance at a police station. The respondents' assessment is that some other means of notification would be open to manipulation or abuse, or would not provide sufficient certainty in the event that alleged non-compliance was challenged. DI Hamlin has specifically addressed the requirement of personal attendance in an affidavit, his fifth in these proceedings, which was filed for this purpose. He avers that the PSNI consider this feature of the statutory scheme to be necessary and proportionate. Mr Kane has also addressed this in a specific affidavit, his fifth also, on behalf of the second respondent. Regrettably, there is now limited documentation available about the consideration of this specific aspect of the statutory scheme when it was being introduced; but it seems likely to have been modelled on the scheme for RSO notifications. Mr Kane confirms that UK Counter Terrorism Policing colleagues also agree with the PSNI as to the necessity and utility of this requirement.

[133] On balance, I am persuaded that this requirement is proportionate. In short, it is important – both in terms of the accuracy of the information provided and for the purposes of enforcement – to be clear that the requisite information has been provided by the RTO personally and to know precisely when and how the notification was given, reducing the scope for another to provide the information or for the RTO to claim a notification was made which has gone awry. Although travel notifications are not required under the 2009 Regulations to be acknowledged in writing (cf. section 50(4) and (5) of the 2008 Act for notifications to which section 50 applies), the pro forma used makes clear that a copy of the form should be given to the offender once it has been completed; and the evidence suggests that this occurs. This protects the interests of the RTO as well as the public interest. Personal attendance at the police station promotes clarity as to the fact that the subject of the notification obligation has complied with it and this is recorded and acknowledged contemporaneously. This was acknowledged by Lord Rodger in relation to the similar requirement in the RSO scheme in the *F* case, at para [65]. Other methods of communication may undermine the statutory purposes if it is unclear when or by whom the notification was made or received. In-person meetings with an RTO, even if only in respect of the annual periodic notification, are also considered to be useful in continued risk management of the individual, which is the overall purpose of the regime.

[134] In reaching this assessment, I also take into account the fact that the whole of Northern Ireland has been defined as a police area for this purpose, so that RTOs have a choice of which station to attend; and take judicial notice of the fact that, due to the size of the jurisdiction, in no case will an appropriate police station be many miles from an RTO's home (nor, indeed, was this suggested). Mr Lancaster's complaint about having to attend the police station in the course of a spontaneous trip, so lengthening the overall journey, is in reality simply an aspect of his complaint (which I have already

discussed above) about the reduction of his freedom to travel on a last-minute basis. More pre-planning is required. In light of the legitimate aim of monitoring those convicted of terrorist offences, that is simply an inconvenience which must be contended with.

Proportionality: information in relation to vehicles

[135] The applicants also complain about the requirement to provide information about vehicles they own or have the right to use. Ms Rafferty in particular complains that she is reluctant to provide details of third parties to the police and is therefore more likely to isolate herself, with a detrimental impact on her re-engagement in society. Mr Lancaster complains that he may have to disclose to someone who asks him to drive their car (perhaps after a social event) that he is subject to the notification requirements.

[136] The evidence provided by the respondents indicates that law enforcement agencies advised that information of this type would be operationally useful to enhance monitoring of RTOs and help identify if any repeat offending was taking place. Some of the information would be relevant for the purpose of locating an RTO who absconded. In the case of vehicles, vehicles owned or used by an RTO could be recognised by automatic number plate recognition, allowing a picture of the offender's activities and movements to be built up for intelligence purposes as well as identifying breaches of the notification requirements. Such information will not always be available to the police by other means and can in any event change quickly.

[137] I am satisfied that the modest intrusion involved in providing vehicle details is proportionate, in light of the potential value of this information for law enforcement purposes. Most people own, or have the habitual right to use, only one or a small number of cars. As to sporadic use of others' cars, the evidence provided by the applicants does not indicate that this issue is likely to be problematic on a regular basis. As I have already observed (see paras [78]-[79] above), the legislation caters for the possibility that infrequent or limited use of another's vehicle can be notified. In Ms Rafferty's case, the concern she raises appears to me to be more fanciful than real. So too the suggestion that her mother's car (if she was insured to drive it) would for that reason alone be regularly stopped and searched with her mother in it. In Mr Lancaster's case, the fact that he is an RTO and subject to the notification requirements is already, to a large degree, a matter of public knowledge. Once it is acknowledged that vehicle information is of assistance in promoting the objects of the notification regime, and having regard to the well-known recourse of terrorist and other offenders to changing vehicles in order to avoid detection or surveillance, it becomes clear that any notification regime which permitted the use of others' vehicles without the authorities being notified would lack efficacy. I consider the requirement to provide this information to be proportionate to the legitimate aim pursued.

Proportionality: financial information

[138] The proportionality of the requirement upon RSOs to provide details of bank, debit and credit card accounts held by them was considered by a Divisional Court in *R (Prothero) v Secretary of State for the Home Department* [2013] EWHC 2830 (Admin); [2014] 1 WLR 1195, in which some of the arguments raised on behalf of the claimant echo those raised by the applicants in the present cases. In that case, the court accepted that the requirement to provide such information interfered with article 8 rights but concluded, firstly, that "there is no doubt that the principal risk faced by the claimant" was that which flowed from his being a registered offender, *i.e.* from the fact of his own offending; and, second, that, in light of the limits of the information obtained and controls upon its use, the interference of these requirements was not nearly as significant as the interference brought about by the other notification requirements (see paras [19]-[21]). In contrast, the provision of these details was valuable to the authorities, particularly in assisting them to trace a registered offender who had moved and failed to notify his new address. In this way, protection was afforded to potential victims.

[139] The claimant in the *Prothero* case contended that the defendant, the SSHD, had not shown by sufficient evidence that the information was needed for this purpose, nor that the relevant aim could not be satisfactorily achieved by other information in the possession of the police or by other means at their disposal. The court recalled – relying on *R (SB) v Governors of Denbigh High School* [2006] UKHL 15 – that, although compatibility with article 8 was a matter for it to determine, a due margin of appreciation had to be provided to the SSHD. Bearing in mind the legitimate policy objectives of the requirements – which apply equally in this case – namely, "the ability to trace an offender quickly, to guard against the risk of an offender using another identity or to have a means of obtaining quick access to a credit card account to investigate offences", the court did not consider the means employed to be in any way inappropriate or disproportionate. On the contrary, it held that, "They are plainly a practical and proportionate means of providing further protection to prevent other persons becoming potential victims of those on the Sexual Offences Register."

[140] This conclusion was drawn having regard, inter alia, to "matters well within the knowledge of any court" (see para [27]). It was self-evident that, if such details were not provided, it would be time-consuming and expensive for the police to exercise statutory powers to try to obtain the same information. The court was left in "little doubt but that the requirements are very valuable in achieving the legitimate aims and are both necessary and proportionate for the achievement of those aims." I consider the same to apply in the case of RTOs, indeed with greater force in light of the urgency which may arise where attempts have to be made to prevent further suspected terrorist offending with potentially devastating impact.

Re-notification of notifiable details

[141] An instance of the applicants exaggerating the inconvenience or undue administrative burden to which they claim to be subject may be found in the case they have made about the requirement to re-notify a wide range of information under

section 47(1) of the 2008 Act if one small detail changes. This formed a discrete strand of the argument. It arises from the obligation in section 48(10) and 48A(8) of the 2008 Act that, where notification is made under one of those sections (because a piece of notifiable information has changed), this must be accompanied by re-notification of the other information mentioned in section 47(2).

[142] I do not consider that, in practice, this is likely to be a significant or onerous undertaking. In the first instance, it might be done by the RTO simply confirming that every other detail which has previously been notified, save for the expressly mentioned change in details which has prompted the re-notification requirement, remains the same. Alternatively, it could be done by the RTO submitting the pro forma document setting out the previous information he has notified (a copy of which is provided to him after notification) with the changed information amended; or by his reading from that document as an aide memoire. Since, for valid reasons, the notification of the change in details must be made in person, the RTO will be required to attend at the police station in any event. Confirming the other notifiable details is unlikely to add significantly to the burden of notifying the change. Indeed, this is supported by Mr Lancaster's fourth affidavit which deals with notification of the purchase of a new car. Although he is critical of some aspects of that notification process, in terms of the re-notification required he has averred that, "The G4S employee went through the form and simply confirmed with me that each section had the same information as on the last occasion and then they inputted that information, until they reached the section about the new motor vehicle."

[143] The purpose of the notification regime would be undermined if the information which is required to be notified could be changed or altered without the authorities being made aware of this. It is important that the information is kept up to date if it is to be used for the statutory purposes. When a notification of a change is required to be made, it is entirely sensible that the accuracy of the remaining information is checked. A change in one notifiable detail may well be accompanied by other related changes (for instance, a change in address might also result in a change in contact details); and a notifiable change (such as a change in name) might be relevant to attempted circumvention of the notification requirements (such as the obtaining of a credit card unknown to the authorities). I have no hesitation in finding that this requirement is proportionate.

Automatic imposition; the length of the requirement to notify; and the absence of a review mechanism

[144] I have dealt above with the principle of requiring RTOs to provide the information which they are required to notify under the 2008 Act and the 2009 Regulations. A further aspect of the challenge is that, even if these requirements are proportionate and permissible in principle (as I have held), they should not be automatically applied or should not be applied for as long as they are. Relatedly, it is contended that their application to an individual should be subject to periodic review. I therefore turn to address these aspects of the challenge.

[145] The statutory scheme provides that the duration of the period for which an RTO will be required to comply with the notification requirements is determined largely by the length of the sentence imposed upon him or her. So, for instance, Mr Lancaster's 12 month sentence results in his being subject to the requirements for 10 years from the date of his sentence (the shortest available period). A sentence of five years' imprisonment or more, but less than 10 years, would result in a notification period of 15 years; while a sentence of 10 years' imprisonment or more would result in a notification period of 30 years. This is the result of section 53(1)-(3) of the 2008 Act. I have referred to this as a graduated approach.

[146] In my view, this is an area where it is permissible for the legislature to adopt a bright line rule. The Court of Appeal in England has formed a similar view: see para [14] of the *Irfan* decision discussed further below. The fact that the court might consider that the bright line rule could have been drawn in a different location will not suffice to justify intervention. The use of such rules will not necessarily offend the Convention: see *Animal Defenders v United Kingdom* (2013) 57 EHRR 21, at para 106; the discussion of this issue by Lord Sumption in *R (P) v Justice Secretary* [2020] AC 185, at paras [48]-[50]; and *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820, at paras [36], [88] and [98]. Where 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.

[147] Often such rules will be permitted in cases involving social security benefits, where an extremely wide range of cases must be catered for and an individual, in-depth case-by-case assessment would be unworkable. In the present instance, the context is different. On one view, some form of risk assessment by the sentencing judge might be possible; but in my judgment Parliament was entitled to take the view that this was unnecessary. The notification requirements apply only to those convicted of serious criminal offences which are terrorist offences or terrorist-related offences. The suggestion that a judge could predict, with precision, the length of time for which such requirements would be required is unrealistic. As the cases referred to at paras [124]-[125] above indicate, prediction of terrorist-related offending and risk is extremely difficult, particularly if the judge considering the matter has to look some distance into the future (as is necessary in seeking to manage the risk of re-offending of an RTO). It would also be difficult to assess risk in cases where, to some degree, this assessment ought to be based upon, or informed by, closed material which is not capable of being openly disclosed for legitimate reasons of national security. These difficulties are compounded given the lack of Probation input in terrorist-related cases (discussed in the *Mackle* case). Cases such as the *Animal Defenders* case indicate that a general measure is permissible where there is a risk of abuse if a general measure is relaxed, that being a risk which is generally for the State to assess.

[148] The need for a precautionary approach in relation to the prevention of future terrorist offending, where those concerned have been convicted of serious offences

already, is one such context, so that the concern must be as to the Convention compatibility of the system as a whole, not the individual circumstances of a small number of particular applicants who might be affected. The system adopted by Parliament is such as to, generally, promote legal certainty and limit arbitrariness and inconsistency in the application of counter-terrorism measures. It understandably operates on a precautionary basis. At the same time, it is graduated in a way which pays heed to the seriousness of the RTO's offending, as calibrated by the sentence he or she has received.

[149] The English Divisional Court in *Halabi* applied a decision of Kerr J in this jurisdiction in *Re Gallagher's Application* which also considered the automatic imposition of notification requirements. In *Gallagher*, Kerr J held as follows (at paras [23]-[25] of his judgment):

> "It is inevitable that a scheme which applies to sex offenders generally will bear more heavily on some individuals than others. But to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance.
>
> The gravity of sex offences and the serious harm that is caused to those who suffer sexual abuse must weigh heavily in favour of a scheme designed to protect potential victims of such crimes. It is important, of course, that one should not allow revulsion to colour one's attitude to the measures necessary to curtail such criminal behaviour. A scheme that interferes with an individual's right to respect for his private and family life must be capable of justification in the sense that it can be shown that such interference will achieve the aim that it aspires to and will not simply act as a penalty on the offender.
>
> The automatic nature of the notification requirements is in my judgment a necessary and reasonable element of the scheme. Its purpose is to ensure that the police are aware of the whereabouts of all serious sex offenders. This knowledge is of obvious assistance in the detection of offenders and the prevention of crime. If individual offenders were able to obtain exemption from the notification requirements this could – at least potentially - compromise the efficacy of the scheme."

[150] In the *Halabi* case, the court observed that, as here, the length of the notification period was dependent on the length of the sentence imposed and therefore the seriousness of the crime. Further, the details of the notification requirements were limited to notification of certain specific information necessary to enable risk assessment and relevant action to be taken in response to identified risk. This was found to be Convention compliant.

[151] In the first applicant's case, he submits that his offending is "at the very lowest level." I do not accept this. He has been convicted of a serious offence, categorised as a terrorist offence, and the sentencing judge considered that the custody threshold was met when imposing a sentence. It is true that his sentence is at the lowest end of the scale of those dispositions triggering the notification requirements; but that is not to say that his offending was minor. As Kerr J observed in *Gallagher*, to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. Parliament has quite permissibly determined that offending of the nature of Mr Lancaster's should fall within the purview of the notification regime.

[152] The applicants next contend that the statutory scheme is disproportionate because of the absence of any review mechanism which has the capacity to relieve an RTO of the notification requirements before the fixed term during which they are subject to the regime has expired. They rely upon *R (F) v Secretary of State for the Home Department* [2011] 1 AC 331. In that case the Supreme Court held that the failure to provide a review for RSOs who were subject to lifetime notification requirements constituted an unjustified interference with the article 8 rights of those subject to the requirements. At para [51] of his judgment, Lord Phillips said:

> "This case turns, however, on one critical issue. If some of those who are subject to lifetime notification requirements no longer pose any significant risk of committing further sexual offences and it is possible for them to demonstrate that this is the case, there is no point in subjecting them to supervision or management or to the interference with their article 8 rights involved in visits to their local police stations in order to provide information about their places of residence and their travel plans. Indeed subjecting them to these requirements can only impose an unnecessary and unproductive burden on the responsible authorities. We were informed that there are now some 24,000 ex-offenders subject to notification requirements and this number will inevitably grow."

[153] There are, however, a number of obvious distinctions to be drawn between the situation which fell for consideration in the *F* case and the present applications. In the first instance, in the *F* case, the claimants were subject to a *lifetime* notification regime. That is not so in the present cases. As explained above, the 2008 Act uses a graduated

approach depending upon the severity of the sentence imposed. Even for those most serious offences warranting a sentence of imprisonment for 10 years or more, up to a life sentence, the period for which the notification requirements apply is finite. This feature is underscored when one has regard to the fact that the Sexual Offences Act 2003 (Remedial) Order 2012, which was made to remedy the Convention incompatibility identified in the *F* case, only enables those RSOs who would otherwise be subject to *lifetime* notification requirements to seek a review of the application of the notification regime to them; and to do so only after a period of 15 years in the case of adult offenders. Secondly, the offenders in the *F* case were sex offenders and not terrorist offenders. As already discussed, any direct analogy between these different types of offenders is inapposite.

[154] The applicants can point to the fact that the Joint Committee on Human Rights (JCHR) scrutinised the 2019 Act in its 9th Report and recommended (at paras 48-49) the inclusion of a review mechanism, expressing the concern that "the revisions to the current system are likely to be considered a disproportionate and unjustified interference with Article 8 rights due to the lack of any possibility of review for those on the register for exceptionally lengthy periods of time." The Committee recommended the possibility of review of the necessity of the notification and registration requirements, with an individual who was subject to the requirements having the right to make representations. In light of this recommendation, an amendment to the Bill was proposed which would have provided an RTO with a right to apply for a review of the necessity and proportionality of the notification requirements every five years (by way of an application to the chief officer of police in the area in which the individual resided, with an appeal to the Special Immigration Appeals Commission). This proposal was rejected by the Government; and the peer sponsoring the amendment in the House of Lords withdrew it in light of the government response.

[155] The applicants can additionally point to a recent report of the IRTL, which observed:

> "There is no opportunity to seek a review of the period, or the amount of information that must be provided. … As the burden of notification for qualifying terrorist offenders increases, the lack of review mechanism appears unfair and counter-productive, because it offers no means of tapering obligations to aid reintegration and reward good behaviour. I recommend that consideration be given to establishing a means to review terrorist notification requirements"

[156] I do not accept that it follows from this (as Ms Rafferty's representatives argued) that the mere fact that the new requirements, in the absence of a review mechanism, *could* (in the IRTL's view) be counter-productive in some cases means that they are not rationally connected to a legitimate aim for the purpose of Convention analysis.

[157] The ECtHR in *Bouchacourt v France* (App No 5335/06) held that notification and registration requirements for up to 30 years (in what the JCHR felt were very similar circumstances to the UK system under consideration here) were only compliant with article 8 due to the possibility of review.

[158] At the domestic level, however, this issue has already been the subject of adjudication. In *R (Irfan) v Secretary of State for the Home Department* (*supra*), the English Court of Appeal considered whether the absence of a review in respect of notification requirements on an RTO for a period of 10 years constituted a breach of article 8. The court considered that there was no article 8 violation in the circumstances of that case. It distinguished the decision in *F*, noting that terrorism is different from sex offending in light of the unique feature of terrorist offences by which a single act can cause untold damage, including loss of life, to a large number of people by someone motivated by extreme political or religious fanaticism. The court noted that, even in the field of terrorist offending, the approach must not be disproportionate. The applicants rely on this dictum and seek to distinguish their cases from the holding in *Irfan*, particularly (in Mr Lancaster's case) on the basis of the offence of which the claimant in *Irfan* was convicted, namely engaging in conduct with the intention of assisting in the commission of acts of terrorism, contrary to section 5(1) of the Terrorism Act 2006, attracting a sentence of four years' imprisonment; and on the basis of the limited application of the scheme to that claimant in that case.

[159] The court in *Irfan* noted that it was important to concentrate on the actual requirements of the scheme, which were very modest in respect of the claimant in his circumstances (see para [13] of the judgment). However, the court also concluded that there was no breach of article 8 on the part of "*either* the scheme *or* its application to the claimant." It also rejected the argument that the ECtHR's decision in *Bouchacourt* was determinative of the proportionality of a lesser notification period than was at issue in that case (ie a period of less than 30 years). Even in the context of RSOs, *Bouchacourt* did not mean that a 10-year notification period was disproportionate. Overall, the Court of Appeal found the application of the (pre-2019 amendment) notification regime for RTOs for a period of 10 years to be proportionate. A key passage is that contained in paras [13]-[14] of Maurice Kay LJ's judgment, on behalf of the court:

> "The notification requirement in the present case is one of ten years from the date of release from imprisonment on licence. Is there anything disproportionate about such a requirement, even in the absence of a right to a review? In my judgment, there is not. I come to this conclusion for a number of reasons. *First* , like the Divisional Court, and as I have explained, I consider that terrorism offences fall into a special category. *Secondly* , the context is one in which it is appropriate to accord considerable weight to the view of Parliament… *Thirdly*, it is important to concentrate on the

> actual requirements. They do not remotely resemble the stringent conditions which attached to many control orders—for example, the 16-hour curfew in AV's case... Whilst, as is now conceded on behalf of the Secretary of State, all this amounts to an interference with the claimant's private life for the purposes of article 8 , it is essentially "light-touch" when set against the legitimate aim of the prevention of terrorism, or (in article 8 terms) "the interests of national security" and "the prevention of disorder or crime." It is important to keep in mind the gravity of the disorder or crime which is being sought to be prevented.
>
> *Fourthly* , even if it is the case that there may be exceptional cases of "no significant future risk", their possible existence does not preclude a general requirement of relatively moderate interference in a context such as this…"

[160] The *Irfan* case was followed by the Divisional Court in this jurisdiction (Morgan LCJ, Deeny LJ, and Burgess J) in *Re McDonnell's Application* [2019] NIQB 48, addressing the notification requirements in the 2008 Act before their amendment. This is powerful authority for the proposition that a notification period of up to 10 years without review is Convention compliant.

[161] The applicants further rely upon the decision of Cranston J in *Commissioner of Police of the Metropolis v Ahsan* [2016] 1 WLR 654. That case arose in slightly different circumstances, where a police commissioner applied for a notification order in respect of the respondent by virtue of an offence of which he had been convicted in the United States of America. Accordingly, the court had a discretion as to whether to make a notification order, rather than the notification requirements applying automatically by operation of law: compare section 40(1) of the 2008 Act with section 40(2). The judge refused to grant the application in light of a variety of considerations which arose in that case. The US sentencing judge had stated that the respondent posed no serious risk of engaging in terrorism and had never intended to be a terrorist. There was no evidence that he had adopted the beliefs of people who believed in attacks on civilians. Further, the undisputed medical evidence was of serious detrimental consequences for the respondent's mental health from the imposition of notification requirements. The judge also took into account that, once the requirements were imposed there was no review mechanism, and they would continue for 15 years whatever the adverse consequences on the respondent. The likely deterioration in the respondent's mental health meant that the interference with his article 8 rights required significantly more by way of justification if it was to be lawful. Against the background of the finding that the respondent did not pose a threat, the commissioner had not made out his case for the making of a notification order.

[162] However, the absence of a review mechanism alone did not result in the finding in the respondent's favour in *Ahsan*. Cranston J considered that this was one of those

exceptional cases where there was no significant future risk posed by the applicant (see para [51]). That flowed from the sentencing judge's comments; and it is potentially significant that no applicant in the present proceedings can point to a similar conclusion in their own case. (Indeed, the sentencing remarks in respect of the applicants have been furnished in evidence and provide no hint of any such sentiment). The evidence about the respondent's mental health was also considered to be crucial in that case, to the effect that the notification requirements would have a severe adverse impact on Mr Ahsan which was likely to lead to a severe depressive illness and an accompanying high risk of attempted suicide. In my view, the *Ahsan* case turns very much on its own facts.

[163] In contrast, in *Halabi*, the Divisional Court also applied the approach in *F* and determined that, where a person had committed a serious offence (there, a sexual offence) so as to be subject to indefinite notification requirements, the continuation of such requirements for a minimum period of 15 years was not disproportionate, despite the notification regime being automatic. In so concluding, the court referred to Scottish authority – *Main v Scottish Ministers* [2015] SC 639 – in which Lord Malcolm also observed that, although the decision in *F* required a review, the uncertainties in predicting the risk of reoffending "remains a factor which supports the review being timed so as to allow consideration of the offender's behaviour over a substantial period while living in the community."

[164] In view of the above discussion, I am satisfied that there is 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. I need not determine the question of whether a 30 year notification requirement without the possibility of review is similarly proportionate as it does not arise in this case. In these applications, the maximum notification period (in the case of Ms Rafferty) is one of 15 years. In the other cases the notification period is one of 10 years. I consider these to be proportionate on the basis of the decisions in *Irfan* and *Halabi*. They do not reach the threshold (described by the JCHR as an "exceptionally lengthy period of time") where the absence of a release valve is beyond the margin of discretion available to the legislature.

Conclusion on article 8 compliance

[165] The evidence provided by the respondents supports the view that registered terrorist offenders, in some instances, will sadly go on to reoffend. Of the 54 RTOs resident in Northern Ireland, the PSNI's evidence was that one of these has been convicted of a further specified terrorism offence since the conviction which led to them becoming an RTO. 19 of the RTOs have committed criminal offences other than specified terrorism offences, since the convictions which led to them becoming RTOs. 21 of them were arrested, on a total of some 65 occasions, since the convictions which led to them becoming RTOs. 14 are subject to ongoing criminal prosecutions, four of which relate to further specified terrorism offending. Eight of these RTOs were arrested under section 41 of the Terrorism Act on some 16 occasions since their

convictions. Of course, not every arrest or prosecution indicates that re-offending has occurred; much less that it can be proven to the criminal standard. But RTOs cannot be assumed to be model citizens. It is a depressing fact that those convicted of serious terrorism offences may become more radicalised or determined, rather than rehabilitated, by the sentences imposed upon them. Continued vigilance is required. As the authorities show, given the difficulty in predicting risk in this area, a precautionary approach is not only appropriate but required.

[166] There will be those such as the first applicant in these proceedings for whom the notification requirements are a considerable inconvenience and will require some modification of their prior way of daily living. The evidence suggests that there will be few who are affected in such a way as Mr Lancaster. The role of the court is to assess the Convention compliance of the scheme as a whole. I find that, notwithstanding the various objections made to it by the applicants, in its application and operation it pursues legitimate aims under the Convention and does so in a way which is proportionate.

The article 14 challenge

[167] I must nonetheless go on to consider in detail the applicants' challenge under article 14 of the Convention. Although the interference with their article 8 rights has been held to be justified, that is not the end of the matter since, for article 14 purposes, it is the differential treatment (or differential impact) which needs to be justified rather than the measures themselves.

[168] The parties were agreed that the effect of the notification requirements at issue in these proceedings falls within the ambit of the applicants' rights under article 8. The core elements of dispute between the parties in relation to the applicants' article 14 challenge were those of status; differential treatment (that is to say, whether there was differential treatment of the applicants as compared with someone in a materially analogous situation or, alternatively, similar treatment of the applicants as compared with someone in a materially different situation); and justification.

[169] The law in this area was developing at the time of the hearing (or that part of the hearing dealing with article 14) and the parties were permitted to submit additional written submissions some time after the hearings concluded to deal with more recent decisions of the higher courts in this area.

The applicants' status and the relevant comparators

[170] A number of broad and sweeping statements are contained in some of the applicants' evidence about the purported impact of the notification requirements on certain sections of the community. For instance, in Mr Lancaster's grounding affidavit he avers that he believes that the new requirements will have more significant impact on "Irish nationals, Catholics and those who live in Northern Ireland and particularly in border areas, than they would on British nationals, non-Catholics and those who do

not live in Northern Ireland or border areas." He further avers that Irish nationals and/or Catholics and/or those who live in Northern Ireland, where there is an easily crossed land border, are more likely to travel over the border more often; and that British nationals and/or non-Catholics and/or those who do not live in Northern Ireland are less likely to travel across the border in order to visit friends and relatives who live across the border. This characterisation – and similarly broad pleading – led the respondents to contend that the applicants had not identified with precision, as they ought, the precise basis on which their article 14 claim was advanced, especially in relation to the status and comparators relied upon.

[171] The applicants' final and settled position on the issue of which status they contended was relevant for the purpose of their discrimination claim was 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. The association with a national minority is constituted, it is argued, either by virtue of residing in Northern Ireland (Northern Ireland being a minority jurisdiction within the UK as a whole) or by virtue of identifying as Irish (that being a minority community in the UK as a whole or, potentially, within Northern Ireland). It was properly accepted that cross-border travel is not exclusive to the Catholic or nationalist community, as anyone who lives in a border community may have occasion to cross the border regularly. I accept the applicants' argument, contrary to that advanced by the respondents, that being an RTO is not itself part of the status on which they require to rely, since the comparator they use (an RTO resident in Great Britain) shares that characteristic; and, indeed, it is only RTOs who are subject to the regime under consideration.

[172] The applicants continue to rely heavily on the fact that the Northern Ireland Assembly determined, when considering a broadly analogous statutory regime imposing notification requirements on registered sex offenders, that it was "unworkable" for such offenders resident in Northern Ireland to have to provide notification of travel outside the UK for periods of less than three days. However, the applicants were clear in their submissions that the relevant comparator group for the purposes of their article 14 claim was not that of sex offenders resident in Northern Ireland but, rather, RTOs resident in Great Britain. For reasons already discussed above, I consider that the applicants were right to disavow a contention that sex offenders are essentially in a materially analogous position to terrorist offenders. Once that is recognised, however, the significance of the position of RSOs is dramatically reduced, if relevant at all, in the context of the article 14 claim.

[173] The applicants' article 14 case was put in two ways: first, as a challenge based on indirect discrimination; and, second, as a challenge based on that type discrimination identified in *Thlimmenos v Greece* (2001) 31 EHRR 15 at para 44. These types of discrimination are conceptually distinct but overlap to a large degree. As to indirect discrimination, the applicants argue that there is a general policy applying across the UK which, although couched in neutral terms, discriminates against RTOs resident in Northern Ireland or associated with a national minority. This type of

discrimination falls within the prohibition on discrimination in the enjoyment of Convention rights in article 14: see *DH v Czech Republic* (2008) 47 EHRR 3, at paras 175 and 184. Once the applicants have adduced prima facie evidence that the rule has a disproportionate impact on one group, the burden shifts to the State to show that the difference in treatment is justified.

[174] The applicants' claim of disproportionate adverse impact on someone enjoying their protected status is far from clearly evidenced and amounts to little more than assertion. As previously mentioned, there will be a range of RTOs resident in Northern Ireland who are not particularly troubled by the travel notification requirements, perhaps because they live far from the border or because they have little occasion to cross it (other than for longer periods of time, if at all). The mere assertion that RTOs who have an association with a national minority (Irish citizens living in the UK) are disproportionately adversely affected also seems to me to be problematic. There may well be RTOs resident in Great Britain who are Irish citizens but who do not have the same difficulties as those described by the applicants because they lack the ease of access to the Republic of Ireland, where they may have friends or relatives, enjoyed by the present applicants. There may also be other RTOs resident in the UK who are impacted by the travel notification requirements when visiting relatives abroad because they too are associated with a national minority in terms of being foreign or dual national citizens living in the UK. It is in the nature of the legislative scheme that all such persons seeking to travel abroad will be put to additional inconvenience.

[175] That is not to say that the applicants, or some of them, do not bear a particular burden because of their circumstances; but it seems to me that this arises primarily 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. However, the applicants have (understandably) moved away from reliance upon their having a protected status constituted by the proximity of their residence to the land border. Even assuming this fell within the category of 'other status' protected by article 14, the more precisely defined the status, the less easy it is to establish that one is in an analogous position to the proposed comparator; and the easier it is likely to be for the State to justify any differential treatment (since the relevant status will be much further removed from the innate, largely immutable personal characteristics most closely connected with an individual's identity: see *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, at para [5]). It is of significance that, when the applicants' case on article 14 was initially advanced, emphasis was placed upon the fact that Mr Lancaster (whose representatives led the argument on this topic) was "an Irish national *who lives near the land border* between the UK and the Republic of Ireland" and that "a person who lives very close to a land border (particularly a land border that has no controls) is likely to have family and friends on both sides of the border and is likely to travel across the border regularly for social and leisure purposes" (see paras 85-86 of his initial, updated skeleton argument).

[176] Indirect discrimination claims do not, of course, absolutely require statistical evidence in order to call for justification (see para 188 of *DH*). I am 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. The statistics provided by the respondents, such as they were, did not present a very clear picture; but there was some evidence that RTOs resident in Northern Ireland made more travel notifications for shorter periods than their counterparts resident in Great Britain. I am not in a position to make the same assumption that those who are associated with a national minority are so affected, insofar as that status is applied more selectively than those who reside in Northern Ireland. The argument that those who identify as Irish are much more affected than those who do not so identify lacks any evidential basis and amounts to unwarranted speculation in my view.

[177] As to *Thlimmenos*-type discrimination, that arises where materially different cases have unjustifiably been treated the same, where the principle of equal treatment requires that the differences be reflected. In this case, the applicants assert that they have been treated in precisely the same way as RTOs resident in Great Britain and that their different status – living in a part of the UK with a land border with another jurisdiction – requires them to be treated differently. The similar treatment is found in the standard set of travel notification requirements which are applied across the board as a result of the 2008 Act and 2009 Regulations. It seems to me that, put in this way, the treatment of the applicants does call for justification.

Justification

[178] Whether viewed through the prism of indirect discrimination or a *Thlimmenos* discrimination claim, I am satisfied that the applicants' treatment is justified for the reasons given below.

[179] Ms Quinlivan's case was that the appropriate test by reference to which the court should judge whether the respondents had justified the treatment of her client as compared with others was not the 'manifestly without reasonable foundation' (MWRF) test but, rather, by means of application of the familiar *Bank Mellat* questions (set out at para [74] of Lord Reed's judgment in that case). She accepted that there was a live debate as to whether the MWRF test is applicable outside the field of cases involving welfare benefits or socio-economic issues but submitted that the preponderance of case law supported her contention that in the present case the appropriate test is a more searching proportionality analysis. Ms Quinlivan's fall-back submission, which I accept, was that, even if the appropriate standard of review to be applied by the court to the respondents' justification for differential treatment was that of MWRF, this standard of review nonetheless requires the court to carefully consider the justification put forward by the respondents in a way which amounts to more than simple rationality review. That flows from para [66] of the judgment of Lord Wilson in *R (DA & DS) v Secretary of State for Work and Pensions* [2019] 1 WLR 3289.

[180] The respondents contended that the MWRF test was the applicable approach in this area, relying in particular upon Emmerson and Simor, *Human Rights Practice* (Sweet & Maxwell), at para 14.024, where it is noted that "in areas such as taxation, national security or military policy States will be granted a wider margin of appreciation, and need only show that the difference in treatment has a rational justification and is not 'manifestly without reasonable foundation.'" The applicants took issue with this having been established by the authority cited for that proposition in the text; and also contended that the decision of the Northern Ireland Court of Appeal in *O'Donnell v Department of Communities* [2020] NICA 36 made clear that in this jurisdiction the MWRF test should be applied only in cases arising in the welfare benefits context (notwithstanding decisions of the English Court of Appeal applying the MWRF standard outside that field).

[181] This debate has been overtaken to large degree by the decision of the Supreme Court in *R (SC and Others) v Secretary of State for Work and Pensions* [2021] UKSC 26 (on which, along with a number of other recent significant decisions, the parties made written submissions after the hearing in these cases). The Court of Appeal in this jurisdiction relied heavily upon and applied the *SC* judgment in its later judgment in *Re Cox's Application* [2021] NICA 46.

[182] The emphasis in *SC* was on the overarching test of there being a "reasonable relationship of proportionality" between the legitimate aim being pursued and the means employed to achieve it (see paras [98] of the judgment in *SC*), with a number of factors being identified as apt to heighten or lower the intensity of review in this regard. As Lord Reed made clear at para [114], there is not "a straightforwardly binary approach" between those cases where a MWRF standard is applied and those where it is not. Rather, a balanced overall assessment in the circumstances of the particular case is required. So, where applicable, the MWRF approach may not be conclusive as to the assessment of compatibility with article 14 but is indicative of the width of the margin of appreciation, and hence intensity of review, which is in principle appropriate in the field of welfare benefits (see paras [128]-[129]). Cases concerned with judgments of social and economic policy in the field of welfare benefits are appropriate for low intensity review, so that the judgment of the executive or legislature will generally be respected unless it is MWRF (see paras [158]-[159]). Social security cases are not the only field in which low intensity review is appropriate, however. Whether or not that is so will depend upon a range of factors, including the extent to which the protected status is a 'suspect' status and the nature of the field in which the claimed discrimination arises.

[183] The field of national security is another area where it is established that low intensity review by the courts, or a wide margin of judgment being afforded, is appropriate. At para [160] of his judgment in SC, Lord Reed said this:

> "It may also be helpful to observe that the phrase "manifestly without reasonable foundation", as used by the European court, is merely a way of describing a wide

> margin of appreciation. A wide margin has also been recognised by the European court in numerous other areas where that phrase has not been used, such as national security, penal policy and matters raising sensitive moral or ethical issues."

[184] The approach to be followed by lower courts was then described thus at para [161]:

> "It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the "manifestly without reasonable foundation" formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows, as the Court of Appeal noted in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department (National Residential Landlords Association intervening)* [2020] EWCA Civ 542; [2021] 1 WLR 1151 and *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199; [2021] ICR 236, that the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate."

[185] In the present case (drawing upon the summary contained in para [115] of the judgment of Lord Reed in *SC*), I consider the following matters significant:

(a) 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. Residence in Northern Ireland plainly does not fall within that category. Nor was I persuaded by the applicants' contention that this status was 'linked' to more suspect statuses (such as religious belief or nationality), so raising the level of justification required to be advanced, which appeared to me to be an attempt to avoid the analytical rigour which the article 14 analysis requires. 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.

(b) This case arises in the context of national security in which a wide margin of appreciation is usually allowed to the State.

(c) 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.

(d) 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 (and, indeed, as is apparent from the statistics cited at para [87] above, this is an issue faced most clearly by the UK).

[186] Taking these matters together, I consider that a wide margin of judgment is available to the State in the circumstances of this case and that a substantial degree of weight is to be afforded to the judgment of Parliament (and the SSHD) in their decision to adopt the impugned requirements.

[187] I further consider that the treatment of the applicants is justified for reasons which have been addressed in some detail earlier in this judgment. As discussed above, the ease of cross-border transit in this jurisdiction, coupled with that being a known feature of terrorist operations or activities on the island, means that there is a heightened risk of cross-border travel being used for terrorist purposes and/or such travel not otherwise being detected by law enforcement agencies. To this is added the severe threat level from NIRT in this jurisdiction which has, at a variety of material times, been higher than the terrorist threat level in Great Britain. For these reasons, had this been a conventional discrimination claim, I would consider that the applicants are *not* in an analogous position to their chosen comparators (RTOs resident in Great Britain): see my finding to this effect in *Re Mackle's Application* (*supra*), at para [56]. Although the impact may be greater, the risk factor generating the requirement for the notification regime is greater also.

[188] In light of these factors, any disparate impact on the applicants by reason of their residence in Northern Ireland is in my view justified. This is not a suspect status which attracts a high degree of protection in terms of the justification required for differential treatment or impact. In many cases, the increased burden will not be particularly significant. Where it is otherwise, the State's view that the terrorist threat in Northern Ireland warrants this additional burden in light of the factors mentioned above is within the margin of judgment available to it. Even if a more heightened standard of review was appropriate to the proportionality analysis – for instance if association with a national minority was the relevant status and this is to be viewed as a more suspect ground of discrimination – I would nonetheless hold that the differential impact is justified, bearing in mind the area of discretionary judgment available to the State in the field of national security. In particular, the relaxation of the requirements to permit RTOs in Northern Ireland to travel across the border for several days without any requirement to notify the authorities of this would

unacceptably compromise the achievement of the objective of the legislation; and, for the reasons given above in relation to the article 8 analysis, the impact of the rights infringement is not disproportionate to the likely benefit of the impugned measure.

The article 7 challenge

[189] The applicants further contend that the change in the notification requirements regime brought about by virtue of the 2019 amendments is in breach of article 7 ECHR. Article 7 is in the following terms:

> "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."

[190] It is not in contention that, at the time the applicants were sentenced, the notification requirements (in their unamended form under the 2008 Act) were somewhat different to those which not apply. As discussed above, the 2019 Act introduced a requirement to provide details in respect of a wider category of foreign travel; vehicle use; financial information; identification documents; and additional contact details.

[191] It is obviously the prohibition in the second sentence of article 7 which is potentially relevant for present purposes. Mr Lancaster has pointed out in his evidence that, when he was sentenced, he did not know that the new notification requirements would apply to him. His sentence was one of 12 months' imprisonment, suspended for three years. He avers that, had he known that these new notification requirements were going to come into effect, he would have instructed his legal representatives to make submissions to the court that his sentence should be less than 12 months, so that the relevant notification requirements would not have applied to him at all. However, at the time of the sentencing, all parties (including the court and his legal representatives) were unaware of the significant impact which the new notification requirements would in due course have on him. I am not persuaded by this point. The sentencing judge was required, as Ms Quinlivan accepted in submissions, to apply the relevant sentencing guidelines. I also doubt whether it would have been appropriate for him to artificially reduce the sentence merely in order to avoid the applicant being caught by the notification regime, as intended by Parliament, which would otherwise apply if the sentencing exercise was conducted without reference to this factor. The other applicants simply rely upon the fact that notification requirements have now been imposed upon them when they did not apply, and were not available, at the time of their offending (or, indeed, their being sentenced for that offending).

[192] The issue in respect of article 7 turns upon whether the notification requirements are properly to be viewed in Convention terms as a "penalty." It is not disputed that article 7 should be construed and applied in such a way as to provide effective safeguards against arbitrary punishment; but the respondents strongly contest the suggestion that the notification requirements, either in substance or form, amount to a penalty for the purposes of article 7.

[193] The applicants rely on the fact that the term "penalty" has an autonomous meaning in the Strasbourg jurisprudence such that the classification of the measure in domestic law will not be decisive (see, for instance, *Welch v United Kingdom* (1995) 20 EHRR 247, at paras 27-28). Relevant factors include the measure's classification in domestic law, but also whether it was imposed following conviction for a criminal offence; its nature and purpose; the procedures involved in its making and implementation; and its severity. The second applicant, for instance, relies upon the fact that the PSNI initially accepted in correspondence that the notification requirements will have a "significant impact" on her (albeit their case before this court made no such concession).

[194] The applicants also rely strongly upon the fact that failure to comply with the impugned notification requirements is likely to result in prosecution and conviction. In my view, however, this is actually a factor which points away from the conclusion that the requirements *themselves* are in the nature of penalty.

[195] This case can be contrasted with that of *Jamil v France* (1995) 21 EHRR 65 (which was relied upon by the applicants) in which the challenge was to an order for imprisonment which was imposed in default of payment of the customs fine. The present case is much more comparable to that of *Adamson v United Kingdom* (1999) 28 EHRR CD209, in which the ECtHR found that the registration regime for sex offenders under the Sex Offenders Act 1997 did not constitute a penalty for the purposes of article 7. It is right to note that the requirements which were at issue in that case were less onerous than those faced by the applicants in the present case; but that is simply a matter of degree.

[196] Perhaps of greater assistance still is the decision of the Court of Appeal in this jurisdiction in *R v Foley* [2019] NICA 44. In that case, the court considered a claim based on article 7 and found that sex offender notification requirements were not incompatible with article 7. The court was influenced by the fact that the notification requirements arose by operation of law; that they did not form part of the sentencing process; and that further, independent criminal proceedings were required to impose a penalty in the event of default in compliance with the requirements. The court relied upon the ECtHR decision in *Gardel v France* (App No 16428/05) in which it was held that similar provisions under French law did not violate article 7.

[197] The applicants contend that, in *Gardel*, a key reason underpinning the Strasbourg Court's conclusion was that the obligation in question had a preventative and deterrent nature, rather than being punitive. They contend that there is no basis

for such a conclusion in the present case. I reject that submission. It is based principally on the premise that, in order to be preventative, the matters requiring to be notified must be related in some way to the circumstances of the individual's offending, as well as on the severity of the impact of the requirements on the applicants. I have already rejected the logic of that submission: see para [115] above.

[198] The approach in *Foley* was followed by the Divisional Court in Northern Ireland in *Re Pearce's Application* (*supra*). That was a challenge to the legality of a violent offences prevention order (VOPO), along with a challenge to the Violent Offences Prevention Order (Notification Requirements) Regulations (Northern Ireland) 2016. The court referred to jurisprudence relating to other notification regimes (see para [33]) before addressing its mind to the nature of the notification requirements which were before it. Although the question of whether the impugned measure was imposed following conviction for a criminal offence was a starting point, "this must not distract from consideration of whether the measure constitutes a "penalty"" (see para [35]).

[199] As did the court in *Pearce*, I have come to the clear conclusion that the impugned requirements in this case are not a penalty. They are not so categorised in domestic law. More importantly, however, their aim is plainly forward-looking and preventative, designed to reduce the risk of re-offending in the future in the interests of public protection. The second respondent's evidence is that, "The scheme is primarily a risk management tool but it is also helpful for intelligence purposes." As noted above, it requires only the provision of *information* by the RTO to the police. This can be contrasted with the VOPO which was at issue in *Pearce* which contained much more substantive prohibitions on the applicant's actions and relationships.

[200] An interesting twist in the argument on this issue was the reliance placed upon a document disclosed in the course of the SSHD's evidence which expressed the view that the recommendations extending the Part 4 regime to Northern Ireland would be likely to be welcomed by the Democratic Unionist Party (DUP), "in particular as they will help to address Unionist criticisms that current sentencing practice in NI is too lenient." The applicants say this shows that the additional notification requirements were being viewed as punitive or were being interpreted in this way. The period when the 2019 amendments were being brought forward was during the currency of the Conservative-DUP 'confidence and supply' agreement. As a result of this, there was a greater degree of interaction between government and the DUP in respect of policy initiatives, particularly in relation to Northern Ireland. (The evidence shows that other local political parties were also briefed by the Home Office, including Sinn Féin and the Alliance Party.) Whether or not unionist (or other) politicians would have seen the increase in the notification requirements as being a harsher regime than previously pertained, or as addressing a perceived leniency in sentencing for terrorist offending in this jurisdiction (whether viewed in isolation or in comparison with other jurisdictions), is ultimately neither here nor there. The task of the court is to consider, in accordance with law, whether the impugned measure is one which is punitive

within the meaning of article 7. For the reasons given above, I do not consider that they are.

The free movement challenge

[201] The applicants further contend that the impugned notification requirements relating to travel notification are a breach of their free movement rights under EU law. The enhanced requirements were introduced, and these proceedings were commenced, at a time when EU law was still generally applicable in this jurisdiction. Although it was accepted by the applicants that this position would shortly change, as it now has with the United Kingdom's leaving of the European Union and the end of the transition period, I was nonetheless invited to consider whether there had for a time been a breach of the applicants' rights under the EU law (which might, for instance, be relevant to the applicants' pleaded claims for damages). Some of the rights relied upon below also continue to exist, although on a different basis or in a modified form, as a result of the agreement on the withdrawal of the UK from the EU ("the Withdrawal Agreement"), as given effect in UK law by the European Union (Withdrawal Act) 2018. For instance, Article 14 of the Withdrawal Agreement makes similar provision to Article 4 of Directive 2004/38/EC ("the Citizens' Rights Directive" (CRD)). There was a dispute between the parties as to whether the applicants came within the personal scope of Part Two of the Withdrawal Agreement under Article 10 but, in light of my conclusions below, I do not need to address this issue. It is accepted by the applicants that the rights relating to the provisions of services upon which they relied no longer apply.

[202] Mr Lancaster has averred that he believes that the new notification requirements in relation to travel impacted on his rights as a citizen of the EU and, in particular, on his rights to move freely between member states and access services in other member states without facing discrimination or unwanted barriers. Reliance was placed on Article 20(2) TFEU which provides for citizenship of the Union, which carries with it the right to move and reside freely within the territory of the member states. Article 20(2) recognised, however, that these rights were to be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder. Likewise, Article 21(1) TFEU provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, but subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

[203] The applicants relied on the formulation on the part of the European Court of Justice in *Gebhard* [1996] All ER 189, at para [37], as follows:

> "It follows, however, from the Court's case law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory matter; they must be justified by

> imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it."

[204] Mr Lavery submitted that the impugned requirements to notify cross-border travel were something which put the applicants at a disadvantage when exercising free-movement rights and/or were liable to dissuade them from doing so because of the inconvenience to which they were put, which represented a hinderance in their exercise of free movement. Based on a variety of decisions of the Court of Justice of the European Union (CJEU), he invited me to conclude that the notification requirements therefore represented a restriction on free movement rights which required to be justified on the basis set out immediately above.

[205] Article 27 CRD made provision for the restriction of the freedom of movement in certain circumstances, including on the grounds of public security. However, any such restriction had to be proportionate, based exclusively on the personal conduct of the individual concerned. Article 27(2) provides as follows:

> "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 considerations of general prevention shall not be accepted."

[206] The applicants also relied upon their right to leave or exit the territory of a member state without requiring an exit visa or an equivalent formality. This right is not subject to the prior exercise of free movement rights (see *Byankov* [2013] QB 423, at para [32]); and may be invoked by an applicant against their home member state (see *Jipa* [2008] 3 CMLR 23, at paras 18-20). The right is provided for in Article 4 CRD, in the following terms:

> "(1) Without prejudice to the provisions and travel documents applicable to national border controls, all Union citizens with a valid identity card or passport… Shall have the right to leave the territory of a Member State to travel to another Member State.

(2) No exit visa or equivalent formality may be imposed on the persons to whom paragraph 1 applies."

[207] I can deal with this last argument briefly. The notification requirements do not – as the SSHD noted at the time of the 2019 amendments and argued before this court – restrict the applicants' lawful entitlement to leave the jurisdiction. Rather, they simply impose an obligation to provide information in respect of an intended exercise of that entitlement. Put shortly, the applicants do not require permission to leave the United Kingdom. In the circumstances, it seems to me that the applicants' reliance upon the prohibition in EU law upon member states requiring the issue of an exit visa (or an *equivalent* formality) does not avail them. This was the conclusion reached in relation to similar travel notification requirements by the English Court of Appeal in the *F* case ([2010] 1 WLR 76), at paras [61]-[64], the logic of which appears to me to be unimpeachable. (That issue was not appealed to the Supreme Court). It was also the approach taken by the Divisional Court in this jurisdiction in the *McDonnell* decision (see para [14]). The applicants' reliance on Article 4 CRD, therefore, is misplaced.

[208] None of the applicants are or were seeking to exercise their right of residence to move *and reside* in the Republic of Ireland. The scheme of the 2008 Act caters for this by means of providing for periods of absence from the UK (see sections 55 and 56). An RTO is at liberty to give notice that they are seeking to move out of the UK and are not restricted from doing so by virtue of the notification regime. In fact, the PSNI evidence was that they were responsible for three RTOs who reside in the community in the Republic of Ireland. Should the authorities wish to preclude this, they would be required to seek a foreign travel restriction order (FTRO) under section 58 of, and Schedule 5 to, the 2008 Act. That has not arisen in any of these cases. Where an FTRO is sought, that requires a separate application to a court and there are strict conditions, particularly that "the person's behaviour since the person was dealt with for the offence by virtue of which [the notification] requirements apply makes it necessary for a foreign travel restriction order to be made to prevent the person from taking part in terrorism activity outside the United Kingdom": see para 2(3) of Schedule 5. That requires an in-depth, individual consideration of the offender's circumstances.

[209] However, the applicants also mount a free movement argument in a slightly different way based on their right to access services in another member state. They contend that the impugned notification requirements are also in breach of EU provisions designed to protect the internal market and the right to access services. Article 56 TFEU protects (within the framework of EU law) the freedom to provide services in respect of nationals of member states who are established in a member state. Article 19 of Directive 2006/123/EC ("the Services Directive") provides, in particular, that member states "may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another member state." Article 4(3) of that directive defines a service recipient in very wide terms. The provision has been held to guarantee the right of service recipients, including tourists, to exit a member state for the purpose of obtaining services elsewhere and is a corollary of the right on the part of the service provider to travel (see *Luisi and Carbone* [1985] 3 CMLR 52, at

para 10). "Requirements" for this purpose are also defined in wide terms by Article 4(7).

[210] National measures which hinder such free movement may, however, be justified by reference to the Treaty derogations in Articles 51-52 TFEU or on the basis of the public interest requirements recognised in CJEU case-law, including on grounds of public policy or public security, but these must be proportionate. The respondents rely upon Article 1(5) of the Services Directive, which provides that it does not affect member states' rules of criminal law. However, member states may not restrict the freedom to provide services by applying criminal law provisions which specifically "regulate or affect access" to or exercise of a service activity in circumvention of the rules laid down in the Directive. In light of the provisions of Article 1(5) of the Services Directive, and Articles 51 and 62 TFEU, I do not consider that the free movement provisions of EU law relied upon apply to the notification requirements set out in the 2008 Act. The requirements do not *specifically* regulate or affect access to services. If I am wrong in that, I consider that they do not amount to restrictions for the purpose of the relevant free movement rights and, in any event, consider that they would be proportionate restrictions for the reasons given below (in conjunction with the reasons addressed above as to the proportionality of interference with rights under article 8 ECHR).

[211] As with the argument in relation to restriction of leaving a member state under the CRD, it is important to bear in mind that the notification requirements do not restrict the applicants from using a service supplied by an internal market provider established in the Republic of Ireland. The right to use such a service remains unimpeached. The requirement upon the applicants is merely to notify the relevant authorities if, and in the event that, they intend to travel to the Republic of Ireland. They may be able to use a service supplied by a provider established in the Republic of Ireland without having to travel there. Even if they do have to travel, they are not required to provide any information about the use of the service or their proposed use of it (unless the service is the provision of overnight accommodation which falls to be notified as the address at which the RTO intends to stay for their first night outside the UK). All that is required is a notification of their intention to travel, which is unrelated to the question of market access.

[212] However, the English Court of Appeal in *F* did accept that the notification requirements would be likely to operate so as to inhibit some offenders from travelling without giving due notice; and that they may inhibit departure "in the relatively few cases where it is not possible to give 24 hours' notice" (see paras [62] and [63]). There is a question, therefore, whether the notification requirements should be viewed as a restriction on market access for this purpose.

[213] The applicants accept that these issues were dealt with in this jurisdiction by the Divisional Court in the earlier *McDonnell* case. The Divisional Court dismissed the applicant's case but certified a question of law; and an application for permission to appeal to the Supreme Court was made. The Supreme Court refused that application

in June 2020 on the basis that the application did not raise a point of law which should be considered by the Supreme Court at that time. The *McDonnell* judgment referred to was in a case brought by the third applicant in the present proceedings. His challenge related to the notification requirements under the 2008 Act, although before their enhancement in 2019. The grounds relied upon by the applicant were very similar, if not identical, to the free movement challenge advanced in the present proceedings, relying on Articles 20, 21 and 56 TFEU, on Article 4 CRD and on the Services Directive (see para [7] of the judgment of Morgan LCJ). Not only did the Divisional Court reject the challenge based on Article 4 CRD, it also expressly addressed an argument that the requirements were "capable of discouraging, dissuading and/or making the exercise of a fundamental freedom less attractive", so as to represent a restriction or hinderance upon free movement rights (see paras [8] and [9]). That seems to me to squarely address, in substance, the same issue which is raised again in these proceedings.

[214] The Divisional Court in *McDonnell* stated at para [16] of its judgment that "the right to move and reside freely is not directly interfered with by the imposition of the requirements." It went on, at para [17], to hold as follows:

> "We do not accept that the applicant can construct any indirect effect as a result of the notification requirements for the purpose of demonstrating an interference with the Treaty right to free movement. As a matter of Treaty law the right to move freely has to be effective. There is in our view no proper basis for concluding otherwise in this case. Any inhibiting effect must not be disproportionate. The factors in play in this case are the important Treaty right to freedom of movement and the important public right to be protected from acts of terrorism. That arises directly in cases of sentences of imprisonment while what is at issue here is a very modest intrusion by comparison. As the Court of Appeal in England and Wales said in *R (F a child)* terrorism offences are in a special category. When balancing the need for public protection which is the legitimate aim of the notification requirements against any inhibiting factor in having to go through the physical procedures associated with those requirements we are entirely satisfied that the balance comes down firmly in favour of protection. We do not consider, therefore, that any indirect effect of the notification requirements breaches the Treaty rights contained in Articles 20 and 21 of TFEU."

[215] At para [18] of its decision, the Divisional Court also stated that it did not consider that the submissions based on free movement of services gave rise to any additional basis of challenge. For the reasons already given in the judgment, the court considered that the free movement rights of the applicant had been properly secured

so that he was in a position to avail of services outside the United Kingdom in accordance with his Treaty rights.

[216] The applicants submit that the Divisional Court misdirected itself in relation to whether there was a 'restriction' on free movement rights, wrongly asking whether the notification requirements directly interfered with free movement rights, rather than addressing the question of whether they were liable to hinder or otherwise impeded the exercise of those rights. In addition, they submit that the Divisional Court, in focusing on the proportionality of the interference with free movement rights, failed to consider other conditions which require to be satisfied before public policy or public security restrictions can be consistent with EU law. These include (they submit) that the restrictions are based on personal conduct and are not based solely on previous criminal convictions.

[217] It seems to me that the Divisional Court in the previous *McDonnell* case reached two conclusions relevant to the applicant's claim that – even aside from his reliance on Article 4 CRD – there were unjustified restrictions on his free movement rights arising from the operation of the EU internal market. First, the court rejected the contention that the notification requirements reached the level of hinderance or discouragement to travel which amounted to a restriction which required to be justified for this purpose. Second, if and insofar as required, the court held that any such restriction was in any event justified (and "firmly" so).

[218] I am not technically bound by the Divisional Court's ruling on these matters but authority indicates that I should depart from them only if convinced they are clearly wrong. On the first issue – whether the notification requirements amount to a restriction on free movement – I might myself have come to a different conclusion from the Divisional Court. I note that the English Court of Appeal made comments in the *F* case which might support that view. But I do not consider that the Divisional Court was clearly wrong in its view about the very limited dissuasive effect of the notification requirements, in light of the earlier discussion in this judgment (and, particularly, at para [71]). The SSHD submits that, when analysed, the Luxembourg cases relied upon by the applicants relate wholly or largely to instances where there was a *prohibition* on travel of some kind which was imposed: for instance, the *Jipa* case (Case C-33/07) (a measure prohibiting travelling to Belgium for a period of up to 3 years); the *Byankov* case (Case C-249/11) (an order prohibiting the applicant from leaving Bulgarian territory and preventing him from being issued with a passport or replacement identity documents); and *E v Subdelegación del Gobierna en Álava* (Case C-193/16) (expulsion from Spain with a 10-year entry ban). In other cases the applicants relied upon, the issue was a discriminatory *residence* requirement: for instance, the *Martens* case (C-359/13) (residence requirement upon which the grant of study funding abroad was conditional); and the *de Cuyper* case (C-406/04) (residence requirement upon which unemployment allowances were conditional). The notification requirements at issue in these proceedings are of a different order.

[219] The case of *R (XH) v Secretary of State for the Home Department* [2017] EWCA Civ 41 was a particularly obvious case in domestic law, involving the cancellation of the claimant's passport which was designed (as the court found) to be a near-absolute restriction on the individual's freedom of movement within the European Union. In contrast, the respondents have drawn attention to the case-law of the CJEU which holds that not every disadvantage is to be viewed as a restriction on the right of free movement. Where the effect of a measure is "too uncertain or indirect" to have the requisite deterrent or dissuasive impact, the right will not be interfered with: see, for instance, *Graf v Filzmoser Maschinenbau GmbH* (Case C-190/98) [2000] ECRI-493, at para 25. The court should also look objectively at the deterrent effect of a measure, rather than upon the subjective effect claimed by a complainant about that measure (see Advocate General Sharpston's opinion in *Government of the French Community v Flemish Government* (Case C-212/06) [2008] ECR I-1683, at para 65). Bearing these matters in mind, the Divisional Court's view in *McDonnell* that the impugned notification requirements did not meet the threshold requiring justification is certainly tenable.

[220] If I am wrong about that and should decline to follow the Divisional Court in *McDonnell*, or if the 2019 enhancements of the requirements should properly lead to a different conclusion, I also cannot say the Divisional Court was clearly wrong in relation to the question of justification. The applicants' written argument proceeded on the basis that restrictions on market access rights under the Services Directive would have to satisfy the same strict conditions which are set out in Article 27(2) CRD. I do not accept that submission and, indeed, Mr Lavery KC stepped back from it in oral argument. The CRD relates to the right of residence in other Member States (the "freedom of movement and residence" mentioned in Article 27(1)) and limits member states' right to exclude or expel citizens. Although it may also cover more general measures restricting the right to move and reside – such as removal and refusal of leave to enter or leave – it does not embrace mere notification requirements. The requirements at issue in this case do not restrict the right of residence of a Union citizen or member of their family.

[221] When dealing not with the right of residence set out in the CRD but with the exercise of economic freedoms guaranteed by the Treaty, the conditions which must be fulfilled to justify national measures which are liable to hinder or make less attractive the exercise of those freedoms are those set out in the *Gebhard* case: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. In more recent cases, the CJEU has expressed this test more pithily in terms that a restriction can be justified if it is based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objective of the national provisions. As under the Convention, a margin of appreciation is accorded to member states in assessing their needs of national security (see *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, at para 18, and the *Jipa* case (*supra*), at para 23, quoted for this proposition in the *XH* case, at para [116]).

[222] Notwithstanding that the economic free movement rights discussed above are of fundamental importance to the Union legal order, they are not absolute rights. The Treaties and EU secondary legislation has always permitted member states to place restrictions on the exercise of these rights for overriding reasons relating to the public interest, including on the grounds of public policy and public security. The burden falls on the State to justify the restrictions on the basis of evidence. However, I agree with the Divisional Court in the previous *McDonnell* case that, for the same reasons as are discussed in the article 8 analysis above, the balance falls decisively in favour of the public interest aims which are being pursued.

The data protection challenge

[223] The second and third applicants also complain that the impugned notification regime will result in the police obtaining and storing a large quantity of private information relating to them, including in relation to their movements. They say that there is no apparent procedure in place for how this information will be retained; how long it will be retained; how it will be stored and accessed; how widely it will be disseminated; and the timeframe (if any) for its disposal.

[224] This case was again advanced to some degree by reference to EU law. Directive (EU) 2016/680 ("the Law Enforcement Directive" (LED)) concerns the protection of natural persons with regard to the processing of personal data by competent authorities in the criminal justice context. It overlaps in a number of respects with the General Data Protection Regulation (GDPR); but there is an important distinction in relation to the significance of the data subject's consent. Since the EU legislated in relation to this issue by way of directive, it fell to the UK to implement it in domestic law, which it has done in Part 5 of the Data Protection Act 2018 (DPA). There is no claim that the UK's transposition of the Directive was deficient or non-compliant.

[225] It cannot be in dispute that much of the information collected as a result of the operation of the impugned notification requirements is personal data. I reject the respondents' case insofar as they argued the contrary. The applicants also contended that they may be required to provide some personal data in relation to third parties, particularly in relation to vehicle details. I do not consider this to be correct, when the requirements are carefully considered and properly applied. Section 47(2)(ga) of the 2008 Act requires identifying information in relation to a vehicle which the RTO has a right to use. That information is defined in section 60 and does not include the name of the registered keeper. The person granting permission for use of the vehicle need not be identified in order to comply with the notification obligation.

[226] As to the obtaining and use of any personal data, again the applicants found themselves heavily on the absence of an individualised assessment of the risk they pose; and the absence of review. They submit that the requirement of 'strict necessity' has not been met.

[227] Law enforcement processing is dealt with in Part 3 of the DPA. Section 34 sets out an overview and recounts the six data protection principles which apply. The processing of personal data for law enforcement purposes must be based on law and either on the data subject's consent *or* because the processing is "necessary for the performance of a task carried out for that purpose" by the competent authority: see section 35(2). It is clear that, for processing for the purposes of law enforcement, the subject's consent is not required and some other legitimate legal basis can serve to permit the processing. That is also clear, inter alia, in recitals 35 and 37 of the LED.

[228] I do not consider that the processing in this case is "sensitive processing" for the purpose of section 35(3) DPA, having regard to the definition in section 35(8). The notifiable information would not reveal the racial or ethnic origin of RTOs, nor their religious or philosophical beliefs or trade union membership. It does not concern health, or the individual's sex life or sexual orientation. The details required are factual matters – set out in section 47(2) of the 2008 Act, Schedule 3A to that Act, and regulations 3 and 5 of the 2009 Regulations – which are unrelated to those sensitive topics. The applicants contended there would be processing of their personal data revealing their political opinions. I do not consider that is the case in respect of the details which require to be notified. Their political opinions may be apparent from the circumstances of their offending; but that is a separate matter. Accordingly, the requirement that the processing be "strictly necessary" for the law enforcement purpose does not arise.

[229] Therefore, is the processing of the applicants' personal data, in the absence of their consent, necessary for the performance of a task carried out for that purpose by a competent authority in order to comply with the first data protection principle under section 35(2)(b) DPA? The answer is plainly 'yes.' The PSNI require to be provided with and consider the data firstly for the purpose of ensuring that the notification requirements have been complied with and no offence has been committed by virtue of failure to comply with them; but also, for the obvious purpose of the statutory scheme which is that RTOs' activity should be monitored to some degree in order to assist their rehabilitation and prevent further offending.

[230] The PSNI has provided detailed evidence in relation to its policies in respect of the retention and erasure of personal data. The data security arrangements, as well as the controls on access and use of the data in the PSNI's possession, have been set out in some detail in the evidence provided on its behalf in an affidavit from its designated Data Protection Officer (DPO). The DPO's role and function are set out in sections 69-71 of the DPA. They are an independent expert appointed to advise and assure the Chief Constable (as data controller and Senior Information Risk Owner) in relation to the PSNI's compliance with its obligations under data protection law. The PSNI have systems in place for the storage of information and its management. An individual's rights are set out in a Privacy Notice which is publicly available. A revised Data Protection Service Instruction, updated in 2019, is also available to the public; as is a revised Records Management Service Instruction. Mechanisms are in place to ensure that a data subject's information is only accessed for legitimate purposes, including

that computerised data systems log actions and processes whenever a function is carried out and permits the system to be interrogated to ascertain that only those undertaking an appropriate function have had access to the information, with audits carried out.

[231] The PSNI has undertaken a significant revision of its retention policies subsequent the case of *Re Cavanagh's Application (No 2)* [2019] NIQB 89. The retention period provided for in the new Record Retention and Disposition Schedule (RRDS) sets out that there should be a review of the information held every 10 years in order to ensure it remains necessary for the information to be held. (Indeed, in light of this new policy, Mr Lavery KC did not pursue the retention issue which had previously been in issue.) RTOs continue to enjoy the rights of data subjects, including the right to know what information is held in relation to them and have it rectified or erased where appropriate, as set out in Articles 13 and 16 of the LED and transposed into UK law in Chapter 3 of Part 3 of the DPA. The first respondent's evidence also confirms that further processing of the information, after its initial assessment in terms of compliance with the notification regime, takes place only where there is a legal basis for doing so. The utility and importance of any information provided may not become apparent until sometime later. Personal data relating to third parties does not have to be volunteered by RTOs but, where it is, will be separately categorised by the PSNI's data handling system.

[232] Taking into consideration the policies and processes described in the PSNI's evidence, I am satisfied that the obtaining of information through the regime set out in Part 4 of the 2008 Act, and its subsequent retention and use by the police, is consistent with the DPA. This case is a paradigm of an instance where the consent of an individual cannot be determinative of law enforcement agencies' access to information concerning them. A terrorist offender intent on re-offending would be bound to withhold consent. The information obtained by the police through the notification regime is obtained for a lawful law enforcement purpose and is, thereafter, handled carefully in accordance with detailed policies the PSNI has in place in order to ensure DPA compliance.

The irrationality challenge

[233] Finally, the applicants additionally argued that the requirement that they provide the information required by the impugned notification requirements (with a failure to do so rendering them liable to prosecution) was "irrational, unreasonable and unfair and in breach of the principle of legality and the rule of law" in the circumstances of this case. They relied upon the fact that the PSNI had not by then decided what exactly was required in order to comply with the impugned notification requirements with regard to travel, so that the applicants could not know what was required of them and did not have sufficient guidance setting out exactly what was required.

[234] I do not consider that this limb of the applicants' challenge materially adds anything to the grounds already considered in detail above. Application of the notification requirements to the applicants is not a matter of discretion for the police. The requirements apply by operation of law, as set out in the 2008 Act (as amended) and the 2009 Regulations. For the reasons given above, I have concluded that the requirements, whilst potentially onerous in certain circumstances, are lawful; and that there is no lack of clarity in the requirements such as to contravene the Convention quality of law requirement.

[235] I have recently had occasion to observe that the 'catch-all' pleading that an impugned measure is "in breach of the rule of law" is rarely of assistance: see *Re Finucane's Application* [2022] NIQB 37, at para [121]. So too a pleaded ground of irrationality, particularly where other grounds are relied upon (such as breach of Convention rights) which are likely to involve a more intense or searching scrutiny of the justification of an impugned decision or measure. I reject this final ground of judicial review.

Conclusion

[236] For the detailed reasons given above, I have not found any of the applicants' grounds of challenge to be made out. I, accordingly, dismiss each of the three applications.