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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ED
FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

_____

MCCLOSKEY J

Anonymity

The child involved in these proceedings is entitled to the protection of anonymity. As a result, this judgment does not identify the Applicant (the child's father), the child's mother or the child. Nor does it contain anything which could reasonably lead to their identification. There shall be no publication of the identification of any of these three persons or of anything which could result in identification of the child.

Introduction

[1] By order dated 22 September 2017 the Applicant, a national of Latvia aged 34 years, who has resided in Northern Ireland since 2004, was granted leave to apply for judicial review in order to challenge the second part (only) of the twofold decision of the Respondent, the Secretary of State for the Home Department ("SSHD"), dated 13 July 2017, (a) to deport him under Regulations 23(6)(b) and 27 of the Immigration (European Economic Area) Regulations 2016 (the "*EEA Regulations*"), and (b) to certify the Applicant's removal from the United Kingdom notwithstanding that an appeal against the deportation decision had not yet been commenced or exhausted, under Regulation 33. The first part of this decision is the subject of a separate statutory appeal.

FACTUAL MATRIX

[2] The following are the salient facts:

(a) **2004:** The Applicant moved to Northern Ireland.

(b) **2004 – 2016:** The Applicant resided and worked intermittently in Northern Ireland.

(c) **2003 – 2010:** The Applicant was in a relationship with a lady who has spent her entire life in Northern Ireland.

(d) **December 2006:** A son was born out of the aforementioned relationship.

(e) **2007 – 2017:** The Applicant was convicted of a catalogue of driving offences: driving without insurance, driving without a licence and driving while disqualified.

(f) **06 June 2017:** The Applicant's most recent collection of convictions – driving while disqualified, obstructing the police, fraudulent use of a certificate of insurance and making a false declaration to obtain same, generating a sentence of five months imprisonment and a driving disqualification of three years duration.

(g) **16 June 2017:** Notice of Liability to Deportation.

(h) **04 July 2017**: Applicant's representations in response.

(i) **14 July 2017:** Deportation decision and order.

(j) **22 July 2017**: Notice of Appeal to the First-tier Tribunal ("FtT").

(k) **21 August 2017:** Applicant's release from imprisonment.

(l) **Same date:** Initiation of these proceedings and grant of interim relief restraining SSHD from removing the Applicant from Northern Ireland until further order of the Court.

(m) **01 September 2017:** SSHD's supplementary decision.

(n) **22 September 2017:** Grant of leave to apply for judicial review.

(o) **11 December 2017 and 06 February 2018:** Substantive hearing.

(p) **24 March 2018**: Scheduled date of FtT hearing.

The Impugned Decision

[3] At the stage when these proceedings were initiated, the Secretary of State had made but one decision: see [2](i) above. By this decision the Secretary of State determined to make a deportation order against the Applicant on the ground of public policy under regulation 23(6)(b) and regulation 27 of the EEA Regulations and to certify the Applicant's case under Regulation 33. In the text the decision maker professed to have considered the Applicant's representations dated 04 July 2017. It is evident from what follows that the Applicant's representations and supporting documents related mainly to his frequent employment during the period 2011 to 2014, including evidence that a new job was available to him. This was designed, fundamentally, to persuade the Secretary of State that the Applicant had acquired a permanent right of residence under the EEA Regulations. This status would have made it more difficult to deport him. However, the decision maker considered that the Applicant had failed to provide sufficient evidence of exercising Treaty rights viz working during the requisite minimum period of five years, *inter alia* on account of his periods of imprisonment, with the result that he had not acquired a permanent right of residence.

[4] The legal consequence of this assessment was that the criterion to be applied was whether the Applicant's deportation was justified on grounds of public policy or public security – to be contrasted with "*serious*" grounds of public policy and public security (the intermediate test, or layer of protection) and "*imperative*" grounds of public security (being the maximum level.)

[5] The decision maker also purported to consider Article 8 ECHR. The relevant passage is as follows:

> "*The nature of your Article 8 claim is …… that you have family life with your son who resides in the United Kingdom with your ex-girlfriend. In support of your Article 8 claim you have submitted the following evidence:* ***you have provided no evidence*** *…… you have not provided any evidence of your child's existence, his domestic circumstances, the nature of your relationship with him or what is in their best interest. It is considered reasonable to expect that if you have a genuine and subsisting parental relationship with your child such evidence would be available to you. You have not provided any reason why it is not reasonable to expect you to provide evidence in relation to your child … You*

stated that your son lives in Omagh with your ex-girlfriend ……

You have provided no other information or evidence."

[Emphasis added.]

It is apparent from this passage and all that follows it that the Applicant's assertion that he was the father of a named male child born in a certain month and year, aged 9 and living with an identified mother was rejected outright.

[6] As appears from [2](m) above, following the initiation of proceedings the Secretary of State made a supplementary decision. At this stage a substantially greater quantity of information relating to the child concerned and the child's best interests had been generated via the three affidavits and supporting documents filed in the judicial review proceedings. In brief compass:

(i) The Applicant, in his first affidavit, provided the child's date of birth, described how he had been born in the middle of the Applicant's relationship with a named British citizen in Northern Ireland and asserted that the two adults retained an amicable relationship. One feature of this was their joint efforts "*…. to make sure that* [the child] *has the most stable upbringing*". This entailed direct contact between the Applicant and his son (then aged 10 years) 2 – 3 times weekly and significant financial support from his earnings when employed. Elaborating, the Applicant explained that his son had no connections with Latvia.

(ii) In his second affidavit the Applicant, elaborating, avers that his son spent alternate weekends with him which entailed playing together and arranged visits to specified locations, such as the beach or the zoo. In addition the Applicant saw his son once or twice weekly by travelling to visit him. The three family members also habitually spent Christmas Day together, likewise the boy's birthdays. The Applicant also provides further details of financial contributions to his son's upkeep. In both affidavits he avers that the central purpose of pursuing his statutory appeal is to preserve the father/son relationship and to promote his son's best interests.

(iii) The third of the three affidavits, sworn by the mother of the child, while light in detail, was broadly corroborative of her former partner's affidavits.

(iv) The birth certificate of the child, confirming his parentage as asserted, was also provided.

[7] The advent of this further evidence stimulated a second decision of the Secretary of State, dated 01 September 2017. The purpose of this further decision was expressed in these terms:

> "*Consideration has been given to whether it is in your child's best interests that you are able to remain in the UK pending the determination of any appeal you may bring.*"

The decision maker states, *inter alia*:

> "*No claims have been made to suggest that there will be a risk of serious and irreversible harm to you or your child if you are not permitted to remain in the UK pending the determination of your appeal …*
>
> *No indication has been given that there would be any serious harm caused to your child if this period of non-personal contact was extended for the period of your appeal ……*
>
> *You have not given any reasons why it would not be reasonable for your child to make trips to Latvia to see you if he wished.*"

In this three page letter the criteria of "*real risk of serious and irreversible harm*" to the child is formulated 7 times, while that of "*serious harm*" is invoked once.

[8] The key passage in the letter begins with the statement:

> "*It is not accepted that it is or may be in your child's best interests for you to be able to appeal from the UK. However, …….*"

This is followed by the invocation of the "*strong public interest in deporting you as quickly and efficiently as possible*"; the invocation of the "*serious irreversible harm*" test repeatedly; an assertion that various long-distance forms of communication would be possible; and a reference to recent contact having been confined to telephone during the Applicant's 6 months incarceration.

Finally, the decision maker describes the contemplated separation as "*temporary*", entailing "*your removal pending the final outcome of your appeal …*" There are also references to proportionality.

Statutory Framework

[9] The second of the Secretary of State's decisions has, by amendment, become the target of the Applicant's challenge. Regulation 27(b) of the EEA Regulations provides:

> "*In this regulation, a 'relevant decision' means an EEA decision taken on the grounds of public policy, public security or public health.*"

The impugned decision was, in substance, taken on the ground of public policy. Regulation 27(5) prescribes a series of "*principles*" with which the impugned decision was required to comply. By regulation 27(8) the obligatory menu of considerations specified in Schedule 1 also had to be weighed.

[10] The second element of the statutory framework of significance is regulation 33. This empowers the Secretary of State to direct the removal of a person who has exercised his right of appeal against a EEA decision "*… but the appeal has not been finally determined*": see regulation 33(1)(b). Regulation 33(2) states the obvious viz that the removal must not contravene section 6 of the Human Rights Act 1998. Regulation 33(3) provides:

> "*The grounds upon which the Secretary of State may certify a removal …… including (in particular) that P would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.*"

The third and final ingredient of note in the statutory matrix is regulation 41. This is engaged in circumstances where the appellant has been removed from the United Kingdom under regulations 27 and 33 in circumstances where his appeal had not been finally determined. Regulation 41(2) provides:

> "*P may apply to the Secretary of State for permission to be temporarily admitted …….. to the United Kingdom in order to make submissions in person.*"

By regulation 41(3) and (4):

> "*The Secretary of State must grant P permission, except when P's appearance may cause serious trouble to public policy or public security ….*
>
> *When determining when P is entitled to be given permission, and the duration of P's temporary admission should permission be granted, the Secretary of State must have regard to the dates upon which P will be required to make submissions in person.*"

[11] Section 55(1)(a) of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*") provides:

> "*The Secretary of State must make arrangements for ensuring that …. the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom …*

[namely, per subsection (2)]

> "*… any function of the Secretary of State in relation to immigration, asylum or nationality; ….*
>
> *any function conferred by or by virtue of the Immigration Acts on an Immigration Officer ….*"

Section 55(3) provides:

> "*A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).*"

Consideration of the Applicant's grounds

[12] The permitted grounds of challenge are, in summary, Article 8 ECHR, section 55 of the Borders, Citizenship and Immigration Act 2009 Act and infringement of the Applicant's fair hearing rights under the procedural dimension of Article 8 ECHR and the common law.

[13] As emphasised by the decision of the Upper Tribunal in JO (Nigeria) [2014] UKUT 00517 (IAC) section 55 of BCIA 2009 enshrines two separate, distinct duties. The first is of the substantive variety, whereas the second is essentially procedural in nature. The evident scheme of section 55 is that performance of the second duty is designed to inform, guide and enhance performance of the first. By section 55(1)(a) –

> "*The Secretary of State must make arrangements for ensuring that …. the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom …*

[namely, per subsection (2)]

> "*… any function of the Secretary of State in relation to immigration, asylum or nationality; ….*
>
> *any function conferred by or by virtue of the Immigration Acts on an Immigration Officer ….*"

Section 55(3) provides:

> "*A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).*"

[14] In JO (Nigeria) [2014] UKUT 00517 (IAC) the Upper Tribunal stated with reference to section 55(3) at [6]:

> "*The latter is the crucial, case by case duty to be discharged by decision makers and case workers. It is formulated in terms of an unqualified duty.*"

It added, at [12]:

> *"The second of the duties imposed by section 55 is, per subsection (3), to have regard to the statutory guidance promulgated by the Secretary of State. In considering whether this discrete duty has been discharged in any given case, it will be necessary for the appellate or reviewing Court or Tribunal to take cognisance of the relevant guidance emanating from the same subsection, juxtaposing this with the representations and*

information provided by the person or persons concerned and the ensuing decision. The guidance is an instrument of statutory authority to which the decision maker "must" have regard: there is no element of choice or discretion. The guidance was duly published in November 2009. It is entitled "Every Child Matters: Change for Children".

The Upper Tribunal then considered certain elements of the statutory guidance:

> *"Notably, at paragraph 2.7 it contains a series of "principles" which are rehearsed in the context of a statement that UKBA (the United Kingdom Borders Agency, the Secretary of State's agents) "must ….. act according to ……." same. Three of these principles are worthy of particular note:*
> *(a) Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.(b) Children should be consulted and the wishes and feelings of children taken into account whenever practicable when decisions affecting them are made.*
> *(c) Children should have their applications dealt with in a timely way which minimises uncertainty. I consider that these provisions, considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. The antithesis, namely something cursory, casual or superficial, will plainly not be in accordance with the specific duty imposed by section 55(3) or the overarching duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix. Ditto cases where the decision making process and its product entail little more than giving lip service to the guidance."*

[15] The Upper Tribunal has repeatedly highlighted the absence of evidence that in cases engaging section 55 the free standing duty under section 55(3) is ever performed. During a four year period as President of the Upper Tribunal (Immigration and Asylum Chamber), I dealt with large volumes of such cases. There was no evidence of the performance of this duty by the Secretary of State in any of them. Furthermore, the anecdotal information provided by judicial colleagues was consistently to the same effect. This was repeatedly highlighted in the Tribunal's decisions. Sadly, this has evidently had no impact.

[16] The present case is yet another illustration of an incontestable breach by the Secretary of State of the duty imposed by section 55(3) of BCIA 2009. There is not a semblance of evidence to the contrary. Mr Sands, on behalf of the Secretary of State, did not seek to argue that black is white. He very properly acknowledged that this analysis is irresistible.

[17] Pausing at this juncture, the fundamental step required by section 55(3) is to have regard to the statutory guidance. I consider that the discharge of this duty would be meaningless if the decision maker did not consciously

refer himself, or herself, to the document in question ("*Every Child Matters – Change For Children*" 2009) and conscientiously consider its contents. This elementary exercise would alert the decision maker in immigration and asylum cases to certain passages in particular. First, paragraph 1.14:

> "*In order to safeguard and promote the welfare of individual children, the following should be taken into account, in addition to the relevant section of Part 2 of this guidance. The key features of an effective system are:*

- *Children and young people are listened to and what they have to say is taken seriously and acted on;*

- *Interventions take place at an early point when difficulties or problems are identified;*

- *Where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her. Communication is according to his or her preferred communication method or language; Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family"*

Next, the decision maker would read, at paragraph 1.15:

> "*The following principles underpin work with children and their families to safeguard and promote the welfare of children. They are relevant to varying degrees depending on the functions and level of involvement of the particular agency and the individual practitioner concerned. The UK Border Agency should seek to reflect them as appropriate.*"

Followed by this in paragraph 1.16:

"*Work with children and families should be:*
- *child centred;*
- *rooted in child development;*
- *supporting the achievement of the best possible outcomes for children and improving their wellbeing;*
- *holistic in approach;*
- *ensuring equality of opportunity;*
- *involve children and families, taking their wishes and feelings into account;*
- *building on strengths as well as identifying and addressing difficulties;*
- *multi and inter-agency in its approach;*
- *a continuing process, not an event;*

- *designed to identify and provide the services required, and monitor the impact their provision has on a child's developmental progress; informed by evidence.*"

[18] The decision maker would also read, at paragraph 2.6, under the rubric "*Making arrangements to safeguard and promote welfare in the UK Border Agency*", the following:

> "*The UK Border Agency acknowledges the status and importance of the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action EVERY CHILD MATTERS CHANGE FOR CHILDREN 15 Against Trafficking in Human Beings, and the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.*"

Followed by a menu of "principles" in paragraph 2.7:

> "*The UK Border Agency must also act according to the following principles:*
>
> - *Every child matters even if they are someone subject to immigration control.*
>
> - *In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.*
>
> - *Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.*
>
> - *Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.*
>
> - *Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience.*

Next, paragraph 2.8 elaborates on the interaction of caseworkers with children:

> "*When speaking to a child or dealing with a case involving their welfare, staff must be sensitive to each child's needs. Staff must respond to them in a way that communicates respect, taking into account their needs, and their responsibilities to safeguard and promote their welfare.*"

[19] Dwelling briefly on the fourth of this list of five governing principles, the words "*wherever practicable*" and "*will not always be possible*" draw attention to the practical reality of what may be expected of a decision maker in any given case. Neither the impossible nor the impracticable is expected or required. The importance of this particular principle is that it challenges the decision maker to consider the feasibility of consulting an affected child. The guidance, on this discrete issue is, very sensibly, not prescriptive. Thus, in principle, the simple mechanism of telephonic contact with the child or consultation involving a person who has engagement with the child, such as a social worker or carer, is not excluded. The critical requirement is that the "*wishes and feelings*" of the child be ascertained, as this is a necessary pre-condition to these being "*taken into account*". Adherence to this requirement will have the additional merit of increasing the prospects of exposing cases in which the representations of the parent concerned – typically the parent threatened with removal or deportation – are infected by misrepresentation, invention or exaggeration.

[20] I canvassed with Mr Sands the possibility that, <u>in principle</u>, there might be a case in which a clearly demonstrated failure by the Secretary of State's agents to discharge the duty imposed by section 55(3) could be immaterial in law. It is trite that in a variety of juridical contexts substance prevails over form. I am inclined to the view that this is one such context. Thus, in the abstract, there may be cases in which the decision maker, inadvertently and by good fortune, reaches a decision which <u>in substance</u> discharges the statutory obligation to have regard to the Secretary of State's guidance.

[21] Mr Sands sought to argue that this is such a case. I consider that where an argument of this kind is advanced, it is essential to construct an equation composed of three fundamental elements: all of the information concerning the affected child known to the decision maker; the impugned decision; and the statutory guidance. The groundwork thus completed, the court will then conduct an exercise of analysis and evaluative judgment. In my view, where an exercise of this kind yields the conclusion that the impugned decision <u>might</u> have been different if the statutory guidance had been consciously and conscientiously taken into account the argument will fail. This possibility, which must of course be a sustainable and realistic one, suffices for this purpose.

[22] I am satisfied that this possibility clearly exists in the present case. The court cannot be confident that the best interest's assessment which the decision maker purported to carry out would inevitably have yielded the same outcome if the statutory guidance had been consciously and conscientiously considered. In particular, I consider it highly unlikely that the decision maker's starting point would have been that it is not in the best interests of the Applicant's child for him to remain in Northern Ireland pending the completion of his father's appeal. It seems equally unlikely that the decision maker would have placed such heavy and repeated emphasis on the criterion of "*real risk of serious and irreversible harm*" to the child.

[23] Mr Sands helpfully provided the court with the Home Office publication of August 2017 "Regulations 33 and 41 of the Immigration (European Economic Area) Regulations 2016". This guidance differs from the guidance promulgated under section 55(3) of the 2009 Act. It has no statutory genesis, from which it follows that what it requires of decision makers and what it engenders in, or confers on, affected persons are both governed by common law principles. Elaboration of this discrete point of law is unnecessary in the present case. It suffices, rather, to record that while the guidance makes a fleeting reference to "*Section 55 Children's' Duty Guidance*", it makes no attempt to spell out the statutory duty imposed by section 55(3) on decision makers. Strikingly, this non-statutory guidance dwells at length on the topic of "*serious irreversible harm*". This may well explain the repeated emphasis on this issue in the impugned decision, noted above.

[24] This, in turn, leads to a further issue. I am in no doubt that the impugned decision is infected by a misdirection in law. A reading of the decision as a whole clearly conveys that it was dominated by the decision maker's consideration and application of the test of whether the removal of the Applicant from the United Kingdom pending completion of his appeal would result in serious and irreversible harm to the affected child. The error of law thus committed consisted of the decision maker's failure to perform the twofold exercise required by section 55(1), namely (a) first, to ascertain and identify the child's best interests and, (b) second, to accord to these interests the status of a primary consideration in the decision making exercise. Here the decision maker, demonstrably pre-occupied with the "*serious or irreversible harm*" touchstone, manifestly failed to perform this twofold duty. In this way one identifies the intrinsic dangers in a mere non-statutory guidance document.

[25] I continue to await with interest a case in which section 55(3) of the 2009 Act and all of its ramifications are fully considered by either the Court of Appeal or the Supreme Court. It is a matter of some surprise that this has not yet occurred. Section 55(3) did not merit a mention in either of the leading decisions of the Supreme Court namely Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 and ZH (Tanzania) v Secretary of State for

the Home Department [2011] UKSC 4. Nor has it featured in Court of Appeal decisions where one would have expected it to occupy a place of some importance, a paradigm example being OO (Nigeria) [2017] EWCA Civ 338: passages such as [39] in the judgment of Sir Timothy Lloyd must be considered in this light.

[26] It is equally surprising that section 55(3) did not feature in the most recent authoritative pronouncement of the Supreme Court in this territory, namely the Northern Irish appeal of Makhlouf v Secretary of State for the Home Department [2016] UKSC 59. A perusal of the authorised report confirms that neither JO (Nigeria) nor other relevant reported decisions of the Upper Tribunal was cited (all the more remarkable when one considers that the list of "*additional cases referred to*" scaled the dizzy heights of circa 150!)

[27] Tellingly, one of the central themes of JO (Nigeria) resonates strongly in the concurring opinion of Lady Hale DP in Makhlouf, at [51]:

> *" In my view, the Secretary of State's officials deserve credit for the patience and perseverance with which they conducted their inquiries into the appellant's family circumstances, to which the response was neither as speedy or as helpful as it might have been. There was nothing which should have prompted them to make further enquiries as to the best interests of the children. There is nothing at all to suggest that the best interests of these children require that their father should remain in the United Kingdom. Of course there will be cases where fuller inquiries are warranted or where the best interests of children do outweigh the public interest in deportation or removal. This is emphatically not one of them.*

This harmonises with Lady Hale's earlier observation in ZH (Tanzania) [2011] UKSC 4 at [34]:

> *"Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 of UNCRC provides:*
>
> *"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

And at [35]:

> *"There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however, it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in* EM (Lebanon) *v* Secretary of State for the Home Department *[2008] UKHL 64, [2009] 1 AC 1198, at para 49, [2009] 1 All ER 559:*
>
> > *"Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for."*

Finally at [36]:

> *"The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the "caseowner" in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure art 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time."*

[28] Given the present state of the jurisprudence, some further reflection on the Tameside principle seems appropriate. In a passage familiar to all judicial review practitioners, Lord Diplock stated:

> *"The question for the court is did the Secretary of State ask himself the right question and take reasonable steps to*

> *acquaint himself with the relevant information to enable him to answer it correctly?"*

(Secretary of State for Education and Science v Tameside MBC [1977] AC 104 at 1065B.) Similarly, in R v Secretary of State for the Home Department, Ex parte Venables [1998] AC 407, the Court of Appeal, having emphasised the "*essential*" requirement that the decision maker be "*fully informed of all the material facts and circumstances*", at 455G, considered that he "*… did not adequately inform himself of the full facts and circumstances of the case*" (at 456E).

[29] In Naraynsingh v Commissioner of Police [2004] UKPC 20, the Privy Council highlighted, at [21], that:

> "*Substantially more in the way of investigation was required than was undertaken here.*"

The context of this statement was a successful challenge to a police decision revoking the claimant's firearms licence. Interestingly, the Commissioners formulated this requirement through the lens of a procedurally fair decision making process, holding that a fair procedure demanded that further inquiries be made by the decision making agency in circumstances where a series of questions arose and further information was obviously available. The failure to acquit this discrete duty had the consequence that the Doody requirement of giving the subject a fair opportunity to respond to the case against him could not be fulfilled. If ever there is an example of how principles of public law overlap and interlock, this must surely be it.

[30] While it may be said that the Tameside principle has been restrictively construed, it seems uncontroversial to suggest that this principle is inextricably linked with the entrenched principle of public law that every decision maker take into account all material facts and considerations. In R (Khatun) v Newham LBC [2004] EWCA Civ 55, which involved a challenge to a Council's homelessness policy, Laws LJ formulated a specific question to be addressed in that litigation context, at [33]:

> *"Even though there is no free-standing right to be heard, does the decision-maker's duty to have regard to relevant considerations nevertheless require him to ascertain and take into account* ****55*** *the affected person's views about the subject matter? More pointedly in the present context, does the policy, by denying the applicant the opportunity to view the property and comment, disable the council from the process of accurate decision-making – from an appreciation of all the factors relevant to its decision as to the suitability of the offered property?"*

Having considered the familiar jurisprudential sources, namely Re Findlay [1985] AC 318, 3333 – 354 and Creednz v Governor General [1981] 1 NZLR 172, Laws LJ stated, at [35]:

> *"In my judgment the* CREEDNZ Inc *case (via the decision in* In re Findlay *) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to* Wednesbury *review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court, subject again to* Wednesbury *review, to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor accepted or demonstrated as such.*

His Lordship found support for this doctrinal approach in another familiar passage in the decided cases, that of Neill LJ in R v Kensington and Chelsea LBC, ex parte Bayani [1990] 22 HLR 406, at 415.

[31] This restrictive approach, as I have termed it, finds expression in more recent jurisprudence, in particular the decision of the Divisional Court in R (Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662 (Admin), at [100]. The effect of Khatun and Plantaganet Alliance is to erect a relatively high cross bar for litigants who seek to establish that a decision involving the exercise of public law powers is vitiated by a failure on the part of the decision making agency to undertake certain enquiries.

[32] I consider that there is clear scope for further examination of this doctrinal approach at a higher level, stimulated by at least four juridical considerations. The first is whether the Tameside principle which, after all, emanates from the highest court in the legal system, has been inappropriately emasculated. The second is whether the restrictive approach which I have described is compatible with the entrenched requirement of public law that a decision maker take into account all material facts and considerations. The third is whether this approach is compatible with the calibration of the Wednesbury principle which has been one of the hallmarks of the evolution of public law in recent years. The fourth is whether the broad and intrinsically flexible public law doctrine of procedural irregularity, most frequently (but not invariably) ventilated in cases involving complaints of procedural unfairness, is adequately accommodated in the restrictive approach. The common law being nothing if not organic and resourceful, it remains to be seen whether the superior courts take up this gauntlet in an appropriate future case.

[33] One of the unmistakable features of decision making in cases to which section 55 of the 2009 Act applies is the fusion of statutory duty, statutory guidance and public law. While the statutory guidance must qualify as a

minimum as a material consideration to be taken into account, in obedience to the statutory instruction to decision makers that they must do so, it may also be viewed by reference to the related principle, increasingly viewed through the prism of legitimate expectations, that an instrument of this nature – the more so , I would add, if it has a statutory genesis - will engender a legitimate expectation of compliance absent a compelling reason in law to act otherwise: per Lord Dyson JSC in Lumba v Secretary of State for the Home Department [2011] UKSC 12 at [20].

[34] At this juncture in the evolution of the law I acknowledge that this court, mindful of its position in the hierarchy of our legal system, and taking into account that the principle to be applied to decisions of the English Court of Appeal in the jurisdiction of Northern Ireland is one of persuasiveness rather than binding force, should be slow to venture further in the present case, not least because the decision which I propose to reach does not entail the application of the Tameside principle.

"Out of Country" Appeals

[35] The "out of country" appeal ground, based fundamentally on an assertion of unfair hearing, travels little distance in this case mainly on account of the evidential limitations. I shall, however, address it briefly as it savours of "flavour of the day" and arises in a variety of statutory contexts. There are differing types of certification decisions under section 94 of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"), one of which gave rise to the recent decision of the Supreme Court in Kiarie and Byndloss v SSHD [2017] UKSC 42 was concerned with certification decisions made under section 94(b).

[36] Common to both statutory certification possibilities is the consequence that an appeal can be pursued only from outside the United Kingdom. The Supreme Court held that having regard to the financial, logistical and other barriers, there was no realistic prospect of the effective prosecution and presentation of an appeal from abroad, thereby infringing Article 8 ECHR and, in particular, its procedural dimension. Since SSHD could not have been satisfied, when making the impugned decisions, that the necessary facilities would be available to the Appellants, the decisions were unsustainable in law.

[37] The English Court of Appeal has now given judgment in four conjoined appeals of some importance: see Ashan and Others v SSHD [2017] EWCA Civ 2009. Its central conclusion from the perspective of the present case and other analogous cases currently stayed in this court is that an out of country appeal is not an effective remedy where two conditions are satisfied, namely (a) it would be necessary for the appellant to give oral evidence and

(b) facilities to do so by video link from the foreign country concerned are not realistically available: see [72] – [98].

[38] While the analogy between the regulation 33 regime and those of sections 94 and 94B of NIAA 2002 is evident and, further, while no distinction in principle may be appropriate, one of the features of the decision in Ashan is that it draws attention to the need for evidence bearing on the discrete question of how the exiled immigrant will, in a given case, conduct and participate in his appeal from abroad. This is clearly a case sensitive question. It is not addressed in the evidence assembled in the present case. Furthermore, Regulation 41 has no analogue in the NIAA 2002 regimes in question. Finally, this approach has been confirmed in the very recent decision of the English Court of Appeal in R (Nixon) v SSHD [2018] EWCA Civ 3.

Remedy and Order

[39] The effect of the court's finding that there has been a breach of section 55(3) of the 2009 Act, coupled with the court's diagnosis of a misdirection in law, and the relief which will follow (*infra*) is that the Secretary of State will be obliged to make a fresh decision. In so doing attention will doubtless be paid to the court's observations in the immediately preceding paragraphs. Furthermore, the fresh decision will have to demonstrably evince conscious and conscientious compliance with section 55(3) of the 2009 Act.

[40] Having considered the submissions of the parties' respective counsel, it is clear that the appropriate remedy is an order of certiorari quashing the impugned decision of the Secretary of State. As Mr Sands realistically acknowledged, the application for costs against the Secretary of State is irresistible.