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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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MB's Application (Judicial Review) [2016] NIQB 75

IN THE MATTER OF AN APPLICATION BY MB FOR JUDICIAL REVIEW

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MAGUIRE J

Introduction

[1] The applicant in this case is MB. He is a man aged 43. He is a national of the Czech Republic ("CR"). He left the CR and came to live in the Republic of Ireland ("ROI") in 2004. While living there he entered into a relationship with another Czech national, ES. They have had four children together: three were born in the ROI and one in Northern Ireland.

[2] The children are:

(i) M born on 1 August 2006 in ROI. He is now aged 9.

(ii) W born on 20 September 2007 in ROI. He is now aged 8.

(iii) O born on 12 January 2012 in ROI. He is now aged 4.

(iv) J born on 12 March 2015 in Northern Ireland. He is now aged 1.

None of the children, it is claimed, has ever been to the CR. They speak English though they (where age appropriate) also speak Czech.

[3] The progress of the family has been that they initially lived in Tralee for 4 years but they moved then to Drogheda before, more recently, moving to live in Enniskillen in Northern Ireland.

[4] The family's relocation to Northern Ireland was a response to the deportation of the applicant by the authorities in the ROI. It appears that the applicant was removed from the ROI to the CR. His family then moved to Enniskillen and he joined them there, having entered the United Kingdom ("UK").

[5] The reason for the applicant's deportation from the ROI is that the authorities there, in view of his extensive criminal record, decided that he should be deported on grounds of public policy or public security.

The applicant's criminal record

[6] The applicant has an extensive criminal record which spans three jurisdictions. While in the CR he was the subject of regular criminal convictions mostly relating to dishonesty offences, principally thefts and burglaries. He received some 7 custodial sentences. In October 2002, for example, he was sentenced to a term of imprisonment of 2 years and 6 months.

[7] His offending in the ROI has been wide ranging and includes the following: possession of controlled drugs; arson endangering life; threats to kill; burglaries; thefts; sexual activity with a child under 16; assault occasioning actual bodily harm; and road traffic offences including driving while uninsured. He also has on his record a failure to surrender to custody conviction. He received five custodial sentences in all.

[8] Since coming to the United Kingdom he has twice been convicted of driving without insurance.

[9] Because of the sexual conviction referred to above the applicant is subject to a process for monitoring his whereabouts. He has failed to comply with this regime on occasions and has a conviction in ROI for failing to comply with notification requirements.

The applicant's deportation from the UK

[10] Because of the applicant's criminal record the authorities in the UK have for a period been considering whether or not he should be deported. Their consideration of this seems to have been stimulated by the applicant's conviction for driving without insurance in Northern Ireland on 23 July 2015. Initial communication of the Home Office's concerns (contained in a letter of July 2015), was sent to an old address for him and therefore appears not to have been received. A second letter to the same effect did, however, reach him. This second letter was dated 7 January 2016. It took the form of a notice that the applicant was liable to deportation. It indicated that the Home Office was considering the question of his deportation from the UK because of his criminality. It offered the applicant the opportunity to say why he should not be deported.

[11] The applicant responded to the above letter and representations were made on his behalf by his solicitor on 27 January 2016. These took the form of a 22-paragraph statement signed by the applicant together with some supporting documentation. In particular, the statement explained his family history. The applicant's father had died while living with him and his partner and their children in 2015. He had been buried in Enniskillen. The applicant's immediate family had all moved to live in the ROI. The applicant and his partner had been together as a couple for some 11 years. In that time they had had 4 children who, all but the youngest, J, were either attending or in the case of O, about to attend, local schools. One of the children, M, had some health problems though little detail was provided as to these. The applicant referred to a liver condition from which he suffered for which he was about to receive treatment. The applicant disclosed that he was on state benefits and did not work. He indicated that because of the treatment he was due to receive for his liver problem, he did not expect that he would be able to work while the treatment was on-going. During that time, he said, he would be relying on his family for support. His partner, however, did work. The document went on to say that if the applicant was deported to the CR he would be removed from his entire family network. When deported from the ROI this had had a major impact on his mental health and he had on one occasion tried to commit suicide. The applicant explained his offending history by saying that he had for some years been addicted to drugs and that the offending was connected with the addiction as he offended to pay for his drugs or while under the influence of drugs. In mitigation of his offending record, the applicant claimed that since 2008 he had not offended save for road traffic offences and a breach of his sexual offending notification requirements. His deportation, he said, would be a disproportionate interference with his right to respect for family life.

[12] From the documentation put before the court on behalf of the respondent it is clear that the applicant's representations were considered in relation to the deportation issue. However they failed to persuade the Home Office not to make a deportation order in respect of him. The initial decision to deport appears to have been taken on 2 February 2016. A document explaining the reasons for the deportation bears that date. The formal deportation order was signed on behalf of the Secretary of State for the Home Department on 5 February 2016.

[13] The applicant left the UK on 8 February 2016 and travelled to Slovakia to see a friend. At this time he was unaware that a decision to make a deportation order in respect of him had been made. He returned on 11 February 2016 arriving at Stansted Airport at around 08.00 hrs. When he sought re-entry this was refused and he was returned on the same day to Bratislava on a flight leaving at 19.50 hrs.

[14] These proceedings were begun on 29 April 2016. In the period since 11 February 2016 the applicant has been unable to enter the UK. His partner and family remain in Enniskillen. The applicant has appealed against the decision to make a deportation order. This appeal is listed for hearing on 21 July 2016 in Belfast. His

case has been "certified" for the purpose of regulation 24AA of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The applicant has made an application to the respondent under regulation 29AA for temporary admission to the UK in order that he can submit his case in person before the Lower Tier Tribunal but this application has been unsuccessful.

Events on 11 February 2016

[15] The decisions impugned in these proceedings are principally those of the respondent made on the above date. The applicant was in Stansted airport for 11 hours during which events unfolded. Before the court is an extensive range of materials relating to this period which the court has considered. It is unnecessary to set these out in the judgment. The court has, however, reached conclusions, on the balance of probabilities, as to what occurred. In this regard it is the court's view that:

(a) The applicant came under the scrutiny of the respondent's officials because they had available to them computerised records relating to the fact that the applicant had been subject to a deportation order dated 5 February 2016. They also had access to the reasons for that decision which were contained in a document dated 2 February 2016.

(b) Until the applicant sought entry to the UK on the morning of the 11 February at Stansted airport he was unaware that a deportation order had been made in respect of his position by the respondent. He was aware that he was at risk of a deportation order being made when he left the UK on 8 February 2016 but he first learned about the deportation order having been made after his arrival at the airport.

(c) The applicant was served with a range of paperwork when he was at the airport, though what precisely he received is the subject of extensive dispute as between the deponents for each party. The court does not consider it necessary to seek to resolve these disputes. It will suffice for the court to say that the applicant likely received at least certain key documents such as the deportation order dated 5 February 2016, the statement of the reasons for the order which bears the date 2 February 2016 and the notice of immigration decision of 11 February 2016.

(d) The applicant was interviewed by an immigration officer at the airport. The record of interview suggests that the interview was short. The applicant seems to have thought that he had been stopped because he may have breached his notification requirements in respect of his sexual conviction by leaving the UK without notifying the police of him doing so. This suggests that at the start of the interview the applicant was not aware of the existence of the deportation order. If this was so, he was during the interview made aware of it, as Officer

Hall in his/her affidavit says he/she served the deportation order and the reasons for it on him in the course of the interview.

(e) Decisions were made by the respondent's officials to refuse the applicant admission to the UK and to remove him to the place from which he had come.

The underlying legal basis for the decisions of 11 February 2016

[16] An important issue in this case relates to the question of the precise legal basis on which the decisions of 11 February 2016 were taken. This had been a significant area of dispute between the parties which was fuelled at times by the way in which contemporaneous documents and later correspondence were drafted. At the hearing, Mr Egan BL, who appeared on behalf of the respondent, accepted that while documents could be read in different ways, the key decisions were underpinned by an analysis that the applicant was being denied admission to the UK on grounds of an assessment on that day of what public policy or public security required. He acknowledged that this approach was more consistent with the terms of regulation 19 (1) of the 2006 regulations and less consistent with the case being treated as a regulation 19 (1A) case, *viz* a case where a person was not entitled to admission on the basis that he was already subject to a deportation order. Counsel accepted that to represent what occurred as being based on regulation 19A would run the risk of inaccuracy and also would run the risk of being inconsistent with what actually occurred.

[17] In the light of this – which on the run of the case can only be viewed as a properly made concession - the court will treat the underlying legal basis for the decisions of 11 February 2016 as being a judgment made on that day about what public policy or security required consistent with the terms of regulation 19 (1).

The decisions which are the subject of judicial review

[18] The central decisions which are subject to judicial review are those taken on 11 February 2016. These can be described as the decision to refuse the applicant admission to the UK and the decision, consequential on this decision, to remove the applicant to Slovakia.

[19] In addition the judicial review encompasses two decisions not taken on 11 February 2016. The first is the certification decision referred to at paragraph [14] *supra*. This was taken on 2 February 2016. The second is a decision not to grant the applicant's application to be granted temporary admission to attend his appeal hearing on 21 July 2016. This decision was taken on 7 April 2016.

[20] In what follows the court will deal with the first two decisions together and each of the other two decisions separately. For the avoidance of doubt, the decision of 5 February 2016 to make a deportation order in relation to the applicant does not

form part of this judicial review. Indeed, that decision, as noted above, is currently the subject of an appeal to the Lower Tier Tribunal.

Admission and Removal

[21] The relevant legal framework for these decisions is the 2006 Regulations. It is not in dispute that the applicant as an EEA national ordinarily will enjoy the right to be admitted to the UK if he produces on arrival a valid national identity card or passport issued by an EEA state, here the CR: see regulation 11. However this right is subject to Part 4 of the regulations which deals with refusal of admission and removal. Under regulation 19 (1) "A person is not entitled to be admitted to the United Kingdom … if his exclusion is justified on grounds of public policy, public security or public health in accordance with regulation 21". Regulation 21 refers to "relevant decisions". It is not in dispute between the parties that the decisions at issue in this paragraph are relevant decisions. Regulation 21 (5) is important. It provides that "[w]here a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles-

(a) The decision must comply with the principle of proportionality;

(b) The decision must be based exclusively on the personal conduct of the person concerned;

(c) The personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) Matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) A person's previous criminal convictions do not in themselves justify the decision".

[22] Regulation 21 (6) is also of importance. It states that:

> "Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin".

[23] The record of the decision made by the respondent is the Notice of Immigration Decision (IS 82C). It records the refusal of admission "as a returning EC resident" but it notes that "you are currently the subject of a deportation order". Notwithstanding this, the document goes on to say that "your deportation is considered to be justified on grounds of public policy and/or public security". The document then records the removal directions.

[24] It is notable that the IS 82C contains reference to the Reasons for Deportation Order. It says that on 11 February 2016 this was served on the applicant. However, there is no formal adoption of the reasons in that document (which is dated 2 February 2016) as reasons for the decision not to admit and to remove the applicant.

[25] Notwithstanding this, the respondent submitted to the court that the decision not to admit and to remove was "justified on grounds of public policy and public security as evidenced by the Deportation Order and as set out in the Notice of Reasons for that order".

[26] On the face of the IS 82C it is difficult to see any sign that the required principles referred to in regulation 21 (5) have been applied. None of them is referred to. Likewise, in the context of regulation 21 (6) there is nothing in the IS 82C to suggest that account had been taken of the factors expressly referred to in that provision. To take a simple example, there is nothing in the document which refers to the applicant's family situation. No doubt it is because of this that the respondent seeks to fall back on the Reasons for Deportation document dated 2 February 2016.

[27] Equally there appears to be no reference in the IS 82C document which would demonstrate that the requirements of section 55 of the Borders, Citizenship and Immigration Act 2009 have been met. Section 55 applies to any function of the Secretary of State in relation to immigration, asylum or nationality and would have application in the present context. Accordingly any decision maker would have to have regard to the need to safeguard and promote the welfare of children who are in the UK. On its face, the IS 82C document shows no sign that this was done.

[28] In these circumstances the court has considered the suggestion that the above aspects of the decision making process can be satisfied by the consideration given to the case by an earlier official who considered the case some days before in the context of the making of a deportation order.

[29] In the court's opinion, this line of argument does not avail the respondent. At the factual level, there is no averment from either of the deponents for the respondent who dealt with the applicant on 11 February 2016 that supports the contention now made in these proceedings to the effect that the reasons for the original deportation order were adopted as the reasons for the immigration decisions made on 11 February 2016. This, it seems to the court, is legally important as the respondent does not contend before the court that any official on 11 February

carried out for him or herself the analysis required by the provisions referred to above. Moreover, this is so notwithstanding that one of the officers had the opportunity to, and did, carry out a formal interview with the applicant at 11.00 hrs on 11 February 2016. As the notes of this interview show, there was no attempt on the part of the official in question to go into any significant detail about the applicant's position. In the court's view, it cannot be doubted that in respect of the immigration decisions to refuse admission and to remove it is a *sine qua non* that the terms of regulation 21 (5) and (6) and section 55 of the 2009 Act have been observed. In the circumstances of this case the court does not believe that the decision making in fact was informed by the principles contained in regulation 21 (5) and was in line with the approach indicated in regulation 21 (6). Nor is the court satisfied that the requirements of section 55 of the 2009 Act were complied with. For this reason the court will quash both the decision not to admit and the consequential decision to remove the applicant back to Slovakia. This is not to say that if the respondent was confronted with the same circumstances again the Secretary of State could not arrive again at the same decision. But it is clear to the court that such a re-consideration would only be lawful if the failures identified herein were rectified.

Certification

[30] The certification decision, as noted earlier, is part and parcel of the deportation apparatus.

[31] The legal basis for certification is found in regulation 24AA. Paragraph (1) of the regulation, which is gateway provision, applies to a situation where the Secretary of State intends to give directions for removal of the person in question, here the applicant. But the removal is linked to the situation described in regulation 24 (3) which, in turn, is linked to the circumstances where removal may arise under the power provided by regulation 19 (3). In its material part, regulation 19 (3) reads:

> "…an EEA national who has entered the United Kingdom…may be removed if –
>
> (a) That person does not have or ceases to have a right to reside under these regulations;
>
> (b) The Secretary of State has decided that the person's removal is justified on grounds of public policy, public safety or public health in accordance with regulation 21; or
>
> (c) The Secretary of State has decided that the person's removal is justified on grounds of abuse of rights in accordance with regulation 21B (2)".

[32] It appears to the court and is common ground between the parties that this is a regulation 19 (3) (b) case and the court observes that this provision is cited in the deportation order which was made on 5 February 2016.

[33] Where in respect of such a case the person affected, here the applicant, is entitled to appeal and remains in time to do so from within the UK or there has been an appeal but it has not been finally determined, regulation 24AA (2) permits the Secretary of State to give directions for removal but only if she certifies that despite the appeals process not having been begun or not having been finally determined removal to the country proposed, pending the outcome of the appeal, would not be unlawful under section 6 of the Human Rights Act 1998 ("the 1998 Act").

[34] Regulation 24AA (3) goes on to say that:

> "The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (in particular) that [the appellant or proposed appellant] would not, before the appeal is finally determined, face a real risk of serious irreversible harm if removed to the country…to which he is proposed to be removed".

[35] In the reasons given for the deportation order in this case the issue of certification was dealt with. Following a passage which explained the operation of regulation 24AA under the heading "Certification" the following is stated:

> "Consideration has been given to whether your case should be certified under regulation 24AA of the Immigration (European Economic Area) Regulations 2006 (as amended). The Secretary of State has considered whether there would be a real risk of serious irreversible harm if you were to be removed pending the outcome of any appeal you may bring. The Secretary of State does not consider that such a risk exists because the Czech Republic is an EU member state, and as such you will be afforded a comparable level of support and rights as you would in the UK. The best interests of your children have also been considered. There are many single parents in the UK who look after their children without the support of a partner or while that partner is overseas for prolonged periods. There is no general evidence to suggest that this absence causes the remaining parent or the children serious, irreversible harm and no specific evidence has been provided to the Secretary of State that sufficiently indicates on the balance of

> probabilities that the situation would be different in this case. Therefore it has been decided to certify your case under regulation 24AA".

[36] Mr McQuitty BL, for the applicant, was critical of the way in which the decision maker had carried out his consideration of the certification issue. He submitted that it is clear that the certification issue is a separate issue from the deportation issue and must be treated on its own merits. The key issue, counsel argued, was whether the certification may breach human rights under the 1998 Act. This must be to the forefront in the consideration and a proper assessment must be made. This, Mr McQuitty said, had not occurred in this case where in the consideration of the matter set out above there was not a tailored assessment of compliance with section 6 of the 1998 Act. Centre stage had been given to the issue of whether serious irreversible harm would be sustained by reason of a certification decision. While counsel accepted that was a relevant issue raised by the statutory scheme, it was an insufficient basis on which to certify. Mr McQuitty drew to the court's attention the decision of the Court of Appeal in England and Wales in R (Kiarie) v Secretary of State for the Home Department; R (Byndloss) v Secretary of State for the Home Department [2015] EWCA Civ 1020 in support of his argument as well as a recent decision of the Upper Tribunal R (Masalskas) v Secretary of State for the Home Department IRJ [2015] UKUT 677 (IAC).

[37] The court has carefully considered the above submissions and is satisfied on the basis of the authorities cited that the decision maker in the case before the court has failed to deal with the issue of certification correctly for the reasons put forward by counsel for the applicant. In fact, the decision maker appears to have committed a similar error to that of the decision maker in both of the cases before the Court of Appeal, the focus wrongly being on the question of serious irreversible harm rather than whether removal pending the determination of the appeal would be a breach of section 6.

[38] The court has asked itself whether it should take the course which the Court of Appeal in the Kairie case took of identifying the error but holding that the error was not material. Plainly, however, there is an issue in this case about the Article 8 compliance of removal pending the determination of the appeal where, as here, this involves the separation of the father of four young children from them and their mother. This was not a factor in Kairie where no children were involved. It seems to the court that it cannot exclude the possibility that on a careful assessment of the regulation 24AA human rights question a different outcome could be arrived at than that set out above. For this reason, the court declines to see the error as immaterial.

[39] The court has also considered whether it is appropriate for it to deal with the certification issue at all. There is an argument for not doing so. This is based on the proposition that while the certification legally exists it is not its existence which is serving as a bar to the applicant's re-entry to the UK. At this time what is excluding

the applicant from the UK is the fact that he voluntarily left the UK and simply has not been admitted back into it.

[40] The removal of the certification, it may therefore be said, would not mean that the applicant would be able to return to the UK pending his appeal, as there are other obstacles in the way.

[41] While the court accepts that there is some force in these points it has decided that it would be purposeful nonetheless to deal with the issue of certification as it forms part of the overall matrix of the case. Given its conclusion that the certification has been the product of a flawed decision making process the court considers that it is appropriate that it should quash the decision made on this issue.

The Regulation 29AA issue

[42] The final issue before the court relates to the refusal of the application made by the applicant under regulation 29AA of the 2006 regulations to permit him to be temporarily admitted to the UK for the purpose of his appeal in order to make submissions in person.

[43] Factually an application for this purpose was made by the applicant's solicitor on 23 March 2016. The date of the appeal hearing by this time has been set for 21 July 2016. The response of the respondent was provided on 7 April 2016. It refused the application. While the applicant's solicitor contested this decision, in a further letter from the respondent dated 27 April 2016, it was confirmed.

[44] In respect of an application of this sort it is clear that the norm is that the application should be granted save when the applicant's appearance may cause "serious troubles to public policy or public security": see regulation 29AA (3) and the Upper Tribunal's decision in Kasicky v Secretary of State for the Home Office IJR [2016] UKUT 00107 (IAC) at paragraph [8]. The onus of proof in establishing the exception is on the Secretary of State.

[45] The essential reasoning in the letter of decision appears to be that because of the applicant's past record of offending and the risk which it is said arises of further offending in the future his attendance at the hearing would come within the words "may cause serious troubles to public policy or public security".

[46] The court is of the opinion that the consideration given to this issue by the decision maker does not withstand careful scrutiny. Firstly, the court sees no recognition in the decision letter of the fact that in law the presumption is in favour of the granting of an application of this type. Secondly, the court notes that in a substantial decision letter at no point is there any specification of the exact way or ways in which the applicant's temporary admission to the UK to attend the hearing would cause "serious troubles" to public policy or public security. While the court accepts that the decision letter refers to concerns, these are expressed at such a high

level of generality that it is difficult to see how they would discharge the onus which rests on the Secretary of State to establish what the exception requires. Thirdly, no attention is given in the original letter of decision to the question of managing and reducing any risk the applicant may represent. When this was pointed out to the respondent by the applicant's solicitor in correspondence after the decision was made an insubstantial reply on this point followed.

[47] Subject to the point discussed below, the court is minded to quash this decision.

[48] An issue which the court has considered relates to the requirements set out in 29AA (1) as to when the regulation applies. It applies where:

(a) A person (P) was removed from the United Kingdom pursuant to regulation 19 (3) (b);

(b) P has appealed against the decision referred to in sub-paragraph (a);

(c) A date for P's appeal has been set by the First Tier Tribunal or Upper Tribunal; and

(d) P wants to make submissions before the First Tier Tribunal or Upper Tribunal in person.

[49] The problem arising from the above in the court's mind is whether the present case fits into the above statement of when the regulation applies. The present case is not a case in which the applicant has been removed from the United Kingdom. Rather the applicant left the United Kingdom of his own free will and subsequently was not admitted to it.

[50] In these circumstances the court has gone back to the Directive which the regulations give effect to. This is Directive 2004/38/EC which deals with the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Chapter VI is the relevant part of the Directive. Its subject matter is "Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health". Article 31 of it specifies what are described as "Procedural Safeguards" and Article 31 paragraph 4 appears to be the provision which has given rise to Regulation 29AA. This paragraph states:
"Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his or her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns the denial of entry to the territory".

[51] As the appeal which is upcoming is in respect of the deportation order made by the respondent on 5 February 2016 the substance of Article 31 paragraph 4 has

application to the matter now before the court. This is important as it is the court's view that the language of the Directive in substance and viewed purposively is not limited in the way in which regulation 29AA is limited.

[52] This being so, the court concludes that the language of Regulation 29AA when read in the light of Article 31 paragraph 4, enables the court to take the step of quashing the respondent's regulation 29AA decision.

Conclusion

[53] The court has decided in this case:

(a) To quash by *certiorari* what can be viewed as the admission decision made on 11 February 2016.

(b) Consequentially to (a), to quash by *certiorari* the removal decision of the same date

(c) To quash by *certiorari* the certification decision made on 2 February 2016.

(d) To quash by *certiorari* the regulation 29AA decision made on 7 April 2016.

[54] The court cannot leave the case without expressing its concern that when the applicant arrived at Stansted airport on the morning of 11 February 2016 there was a measure of confusion on the part of the respondent's officials as to the legalities of how to deal with his case which admittedly was a somewhat unusual one. It is now important that, in the light of the court's conclusions and the appeal which is shortly to be convened, that the case is the subject of a speedy reconsideration.