Neutral Citation No: [2018] NIQB 27 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10609** **JR 2018/15533/01** *Delivered: 23/03/18*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY 'OR' FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

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McCloskey J

The Challenge

[1] The Applicant, a national of the Ukraine, challenges a decision of the Secretary of State for the Home Department (the "Secretary of State") dated 09 November 2017, whereby his application for a residence card to confirm his status of extended family member of a EEA National under the European Economic Area Regulations 2016 (the "EEA Regulations") was refused. The proceedings are anonymised to protect the identities of the children of the family concerned, which must not be published or disclosed, directly or indirectly. The hearing was scheduled on a so-called "rolled up" basis.

The impugned decision

[2] The basis of the impugned decision is apparent from the following passages:

> "*You have applied for a residence card as the unmarried partner of an EEA or Swiss national …. you have not provided adequate evidence that you are the partner of an EEA or Swiss national and that you have a durable relationship with them …. You claim to have been residing together since June 2013. You have also provided the passport of* ["MR"]*, however you have not provided a birth certificate to prove your relationship to her, there is no evidence of cohabitation, there is no evidence of joint*

> *finances/commitments/responsibilities and we would expect to receive evidence showing joint finances and commitments since you began living together such as utility bills or bank statements, council tax bills or statements covering this time.*"

This is followed by the notable statement:

> "*No further consideration has been given to the other evidence that you have supplied in support of your application.*"

"VV" is the person asserted to be the Applicant's partner. It is further asserted that they are the parents of a child now aged almost two years born in Northern Ireland.

[3] The application to the Secretary of State giving rise to the impugned decision took the form of a letter from the Applicant's solicitors, a completed pro-forma and a series of attached documents. The solicitor's letter stated *inter alia*:

> "*This application is made on the basis that my client and his EEA national spouse are unmarried partners and that our client is an extended family member under Regulation 8 …..*
>
> *Our client's partner is a 'qualified person' by virtue of her Latvian nationality and her employment. She is a worker as defined by Regulation 4 of the 2006 Regulations … Their relationship began almost three years ago ….*
>
> *They have been living together on a full time basis since June/July 2014 ….*
>
> *My client and his partner have had a child of their own. Their daughter* [MR] *was born on ……* [DATE] *……*
>
> *Enclosed is a copy of that child's Irish passport. My client and his partner have plans to marry and they are currently in the process of arranging this.*"

[4] The completed application form contains details of (*inter alia*) the employment of the Applicant's partner and the child tax credits of which the family was in receipt. The Applicant asserted that he had been living in the United Kingdom for 12 years.

[5] It is appropriate to pause at this juncture. One of the Court's case management directions required the Secretary of State to provide a bundle of all

material documentary evidence. The bundle which has been assembled invites the following comments:

(a) The document purporting to be the completed pro-forma has incoherent internal pagination, a demonstrably series of missing internal pages (for example pages 22 – 26, 30 – 41 and 77 – 88) and is variously and inconsistently described as "EEA (FM) – Version 06/16" and "EEA (FM) – Version 03/17". While there may be an acceptable explanation for this, none was provided with the bundle.

(b) It is not possible to match the documents listed in the aforementioned solicitor's letter of 22 May 2017 with those provided in the Secretary of State's bundle.

While this represents a thoroughly hopeless attempt to comply with the Court's directions it may also invite an inference adverse to the Secretary of State (*infra*).

[6] The documentary evidence available to the Secretary of State included a bundle assembled for the purpose of an earlier application for judicial review brought by the Applicant challenging the first Secretary of State's refusal of his residence card application, dated 26 May 2015. I observe in passing that the copy decision letter in the Secretary of State's bundle is another illustration of a manifestly incomplete document. This bundle contains a series of witness statements and affidavits, HMRC documents relating to tax credits in respect of the Applicant's asserted partner and specified children, a letter from the landlord of the partner's place of residence, the partner's P60 (2014/15), the Home Office formal registration of the Applicant's partner under the "Accession State Worker Registration Scheme" and an accountant's letter relating to the partner's employment in Northern Ireland from September 2014.

The Applicant's grounds

[7] The grounds of challenge are, in summary, an asserted failure to take into account all of the information provided and available to the Secretary of State, breaches of the disjunctive provisions in section 55(1) and (3) of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act"), contravention of section 6 of the Human Rights Act 1998 by breaching Article 8 ECHR and breaches of Articles 7 and 24 of the Charter of Fundamental Rights of the European Union.

Consideration and conclusions

[8] In a challenge of this kind, the main exercise to be conducted by the court entails juxtaposing the whole of the application made to the Secretary of State with the text of the impugned decision. This exercise is carried out through the prism of an indisputable duty on the part of the Secretary of State's agents namely the duty of giving careful and conscientious consideration to the underlying application in

its entirety. As the only external manifestation of what has been decided is the letter of decision, this will invariably be scrutinised by the Court strictly and carefully. While there will unavoidably be an intense focus on the words written, the Court will also be alert to the SOS principle (Re SOS Application [2003] NIJB 252 at [18] – [19] especially) viz every 'disregard' assertion must be demonstrable either by direct evidence or reasonable inference, together with the possibility of making appropriate inferences in favour of the decision maker.

[9] Conducting the aforementioned exercise readily and overwhelmingly invites the assessment that the attempt to discharge the duty which I have framed was, in this case, manifestly inadequate. There is no recognisable nexus between the application presented to the Secretary of State and the ensuing decision. The latter is couched in bare and conclusionary terms which, first, make no attempt to engage with the evidence provided. Second, the letter explicitly states that certain, unspecified evidence was not considered at all. Third, the letter betrays a demonstrably fettered approach, to the point of ignoring the Applicant's individual life circumstances. The conclusion that much of the information provided was not considered at all – much less carefully and consciously so – is effortlessly made. The Applicant's primary ground of challenge succeeds accordingly.

[10] While support for the foregoing analysis and conclusion is not required, it is readily to be found in the Court's observations in [5] and [6] above.

[10] I turn to the next main ground of challenge. It is not in dispute that section 55 of the 2009 Act applied to the impugned decision of the Secretary of State. The twofold duties to which the Secretary of State was thereby subjected are rehearsed *in extenso* in JO (Nigeria) v SSHD [2014] UKUT 517, MA (Pakistan) v SSHD [2016] EWCA Civ 705 and most recently, Re ED's Application [2018] NIQB ……. at [13] and following. In this case the impugned decision evinces a manifest failure to take the elementary step of ascertaining the best interests of the children concerned, coupled with an incontestable failure to comply with section 55(3). This adds up to two egregious public law misdemeanours.

[11] Finally, by virtue and in consequence of the aforementioned failures, the procedural requirements of Article 8 ECHR and Articles 7 and 24 of the Charter have been violated, in breach of the Secretary of State's duties under section 6 of the Human Rights Act 1998 and EU law.

[12] Two further conclusions are appropriate. First, I consider the argument that the Secretary of State was subject to no duty under section 55 of the 2009 Act because no positive case was made under this provision manifestly unsustainable, as it neglects and distorts the clear language of the statute by attempting to superimpose an unexpressed precondition. Section 55 is a paradigm illustration of a proactive and unencumbered legal duty. The trigger for having to discharge the twofold duty would have been apparent to any careful reader of the documents provided with the application. Second, I accept the affidavit evidence on behalf of

the Applicant relating to the date of the impugned decision. The Court would in any event have been amenable to extending time having regard to the importance of the issues engaged, the egregious infirmities in the Secretary of State's decision making, the minimal nature of the delay, the evidence relating to adverse impact on the Applicant's mental health and the absence of any prejudice to the Secretary of State.

Order

[13] While it seems unlikely that the Secretary of State, at the third time of asking, will be able to make a legally defensible decision refusing the Applicant's application for a residence card under the EEA Regulations, in deference to the possibility that this might be achievable, I decline to make an order of mandamus. Rather I order the quashing of the impugned decision, coupled with a mandatory direction that the Secretary of State make a fresh decision within six weeks of the date of this judgment and, in doing so, take into account any further information and representations provided on behalf of the Applicant.

[14] The Applicant is incontestably entitled to his costs.

Footnote

This judicial review was, belatedly, conceded by the Secretary of State. While the concession should have been made much sooner, as the terms of the Court's judgment indicate, this was a commendable choice.