Neutral Citation No. [2015] NIQB 58

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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

A's Application [2015] NIQB 58

**IN THE MATTER OF AN APPLICATION BY A
FOR JUDICIAL REVIEW OF A DECISION BY THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

GILLEN LJ

[1] I have anonymised the name of the applicant ("A"), and his family members by the use of initials. The reason for doing this is that children are involved in the nature of this application. I make an order providing that no person shall publish any material which is intended or likely to identify the applicant or any other child involved in these proceedings except insofar (if at all) as may be permitted by direction of the court.

Introduction

[2] In this matter the applicant seeks judicial review in respect of part of a decision ("the impugned decision") by the Secretary of State for the Home Department ("the respondent" or "the SOSHD") dated 20 November 2014, contained in a decision letter of that date, whereby the respondent certified his removal from the UK ("the certification decision") pending determination of his appeal against a decision to deport him on grounds of public policy following recent convictions for driving while disqualified and using a vehicle without insurance. The respondent has made this impugned decision on foot of the amendments made to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") specifically with reference to Regulation 24AA of the 2006 Regulations.

[3] Mr Egan appeared on behalf of the respondent. Mr McQuitty appeared on behalf of the applicant. I pay tribute to the care and thoroughness with which the respective arguments, both written and oral, were presented to this court.

[4] Leave was granted by Treacy J on 3 March 2015 on limited grounds which I have set out at paragraph [25] of this judgment.

Factual background

[5] The applicant is a Lithuanian national who claims to have first arrived in Northern Ireland in February 2006. He states that he returned to Lithuania in December 2006 to face a criminal charge of "non-severe health impairment" in respect of which he was convicted, serving a five month period of imprisonment. At the conclusion of this he returned to Northern Ireland on 22 May 2007.

[6] His residence in Northern Ireland since his return has been punctuated by five separate periods of imprisonment in this jurisdiction with the effect that he has not lived here continuously for a period of five years and so he has not acquired a permanent right of residence in accordance with Regulation 13 of the Immigration (EEA) Regulations 2006.

[7] The parties were unable to agree, and it remained a matter of dispute, as to the precise number of months that he had actually served in prison since the birth of his daughter in July 2006. It is the respondent's contention that the applicant is a prolific offender who has served a total of ten months' imprisonment during this period whilst the applicant contends that in the event he was only in prison for relatively short periods totalling about five months over the seven years of his daughter's life. I conclude that the correct figure is probably somewhere in between these two assertions. The relative importance of his period in prison is that the respondent, in an affidavit of 2015 of Andrew Maighan, Executive Officer, Immigration/ Enforcement department of the Home Office, at paragraph [6], relies on these periods to rebut the assertion that the applicant had moved to Northern Ireland to start a new life with his partner at the conclusion of a period of extensive and prolonged offending in Lithuania and to declare that these periods of imprisonment illustrate that he regularly has been apart from his daughter. On the other hand the applicant contends that these were such short periods that they do not represent an absent father and, in particular, since his release from jail on 19 February 2015, he has been living without issue or incident with the family, following the earlier periods of imprisonment and immigration detention in 2014.

[8] The applicant's family, as set out in his grounding affidavit, comprises:

- His partner (who has filed an affidavit dated 8 January 2015) whom the applicant asserts suffers from depression and who has a criminal record also, albeit less significant than that of the applicant. The respondent asserts that at the time the decision was made to deport the applicant, there was no evidence from any medical report to this effect and the present evidence appears to amount to a work "sick line" issued by the applicant's GP and dated 4 December 2014, after the decisions had been made.

- A daughter B was born in July 2006. The applicant asserts that she is the most vulnerable of a particularly vulnerable family unit. This child was born in Northern Ireland and has lived here all her life although she does not hold British or Irish citizenship. The applicant deposes that the child has been fully aware of her father's recent absence and has been adversely affected by this. The family saw a consultant psychiatrist (Dr Leddy) on 7 May 2015 regarding the impact of further possible disruption on B although this report is not available for this hearing. The respondent points out that at the time the decision was made the applicant had not claimed that the child had any health issues and no additional evidence has been supplied to date in that regard.

- An adult son C who also resides in the family home and allegedly has a history of suicide and self-harm attempts whilst in prison himself. He is currently subject to a deportation decision.

- A baby born recently on 25 February 2015.

- The applicant's partner in her affidavit confirms that the applicant has a very close bond with B, that she has been adversely affected by his prolonged absence, has had dreams about her father as well as nightmares, and has had difficulty sleeping. It is suggested that for periods when his partner has been struggling with depression and subject to short custodial sentences, albeit for relatively minor offences, the applicant has been her primary carer.

- It emerged during this appeal that the full extradition appeal is to be reviewed on 11 June 2015 and the probability is that the hearing of the appeal will be in September. The respondent has indicated that she has been ready to process the appeal against deportation since the appeal was lodged in early 2015 and that the delay has been occasioned by the applicant seeking a medical report.

Statutory background

[10] The background to the relevant legislation is Directive 2004/28/EC ("the Citizenship Directive") Article 31(4) which permits Member States to exclude those it has decided to deport, pending any appeal, subject to certain conditions imposed therein. It has not been seriously argued before this court that the legislation to which I will now turn is inconsistent with that Directive.

[11] Regulations 19(3)(b) and 21 of the 2006 Regulations provide authority for the SOSHD to deport an EEA national or a family member of an EEA national where the

person's removal would be justified on the grounds of public policy, public security or public health.

[12] Regulation 21(5) refers to a relevant decision (which includes a decision to remove a person from the UK on such grounds) and is couched in the following terms:

> "(5) Where 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.
>
> (6) 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."

[13] Regulation 29, as amended, in effect gives the SOSHD authority to remove from the UK a person whom he/she has decided to deport pending any appeal against the deportation decision.

[14] The power to remove pending appeal is governed by Regulation 24AA. Where relevant that Regulation provides:

> "(1) This Regulation applies where the Secretary of State intends to give directions for the removal of a person ("P") to whom Regulation 24(3) applies, in circumstances where –
>
> (a) P has not appealed against the EEA decision to which Regulation 24(3) applies, but would be entitled, and remains within time, to do so from within the United Kingdom (ignoring any possibility of an appeal out of time with permission); or
>
> (b) P has so appealed but the appeal has not been finally determined;
>
> (2) The Secretary of State may only give directions for P's removal if the Secretary of State certifies that, despite the appeal's process not having been begun or not having been finally determined, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of P's appeal, would not be unlawful under Section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
>
> (3) The grounds upon which the Secretary of State may certify a removal under paragraph (2) include (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."

[15] These provisions therefore accommodate the protection of human rights. Interim removal is justified only where it would not be incompatible with Convention rights. Under Regulation 24AA(3) the SOSHD may certify that interim removal is not incompatible with those rights if the person would not, before his appeal is finally determined, face a real risk of "serious irreversible harm" if removed.

[16] These provisions are consistent with the European Court of Human Rights jurisprudence and interim measures under Rule 39 of the Court's Rules of Court. Rule 39 provides that the Court "may indicate to the parties any interim measure

which they consider should be adopted in the interests of the parties or the proper conduct of the proceedings".

[17] The Home Office has provided a document headed "Regulation 24AA Certification Guidance for European Economic Area Deportation Cases" which explains how case owners should consider certifying a human rights claim made by an EEA national in the context of deportation under Regulation 24AA. It specifically refers to the duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"), reciting at paragraphs 1.8 and 1.9 as follows:

> "1.8 The duty in Section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK means that a child's bests interests are of primary consideration in deportation cases.
>
> 1.9 Case owners must carefully consider all of the information and evidence provided concerning the best interests of a child in the UK, in relation to the application of the Regulation 24AA …. Case owners must carefully assess the quality of any evidence provided. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than the unsubstantiated assertions about a child's best interests."

[18] Clearly Regulation 24AA requires that it be shown that removal would not be unlawful since it is not a breach of human rights. That extends to the human rights of any family or partner or children because it would be a breach of Section 6 of the Human Rights Act for a public body to act in a way which affects adversely the human rights of someone who would be affected by the removal of the individual.

[19] In the context of this case the United Nations Convention on the Rights of the Child, and the best interest principle codified in Article 3 in particular, plays a part. The role of the best interest principle is well established as a matter of international obligation. This is probably reflected in the provisions of Section 55 of the 2009 Act which requires the Secretary of State to make arrangements for ensuring that the Secretary of State's functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, including any function of the Secretary of State in relation to immigration, asylum or nationality.

[20] The statutory guidance promulgated by the Secretary of State is referred to in Section 55(3) of the 2009 Act. The statutory guidance is entitled "Every Child Matters – Change for Children" and was published in November 2009. It is

described as "statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children". It prescribes a series of procedures and arrangements applicable to relevant decisions. This requirement contains an instruction to decision-makers that they should consider the desirability of consulting affected children and ascertaining their wishes and feelings in any given case.

Relevant Case Law

[21] Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 is a case where the appellant challenged a decision by the Secretary of State for the Home Department that he did not qualify for asylum or humanitarian protection in the context of her dealing with the best interests of his children. Lord Hodge set out the basic legal principles relevant to such a case involving the interests of a child at paragraph [10] as follows:

> "(1) The best interests of a child are an integral part of the proportionality assessment under Article 8 of the ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
>
> (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
>
> (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
>
> (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment;

> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

[22] In J O and Others (Sections 55 duty) Nigeria [2014] UKUT 00517, McCloskey J addressed the duties that arise under Section 55 of the 2009 Act in light of authorities such as Zoumbas. At paragraph [13] he said:

> "3. The question of whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the Court or tribunal considering this question will frequently……. be confined to the application or submission made to the Secretary of State and the ultimate letter of decision. …These materials will, therefore, call for scrupulous judicial examination in every case. In this context, I concur with the statement of Wyn Williams J in R (TS) v SOSHD and Anor [2010] EWHC 2614 (Admin) at [24]:
>
> > '… The terms of the written decision must be such that it is clear that the substance of the duty was discharged'."

[23] It is important to appreciate that the Secretary of State does not have to record and deal with every piece of evidence in her decision letter (see e.g. Zoumbas at paragraph [23]). Indeed the decision letter does not have to make specific reference to the statutory guidance (see M K (Section 55 – Tribunal Options) Sierra Leone [2015] UKUT 00223 per McCloskey J at paragraph [19]). While explicit reference to guidance would plainly be preferable, this is an issue of substance and not form.

[24] A recent commentary on Regulation 24AA is found in the judgment of Collins J in Macastena v Secretary of State for the Home Department [2015] EWHC 1141 (Admin). This case involved a renewed application for permission to seek judicial review of the decision of the Secretary of State to remove the claimant to Kosovo pending the hearing of his appeal against a decision that he be removed from the United Kingdom following a sentence of imprisonment.

[25] Speaking of the Regulation 24AA interim stage, Collins J said at paragraph [16]:

> "It is not at the interim stage for a further consideration to be given to the factual basis (for expulsion). Only if it would be unlawful for interim

removal ... to take place would it be appropriate to seek to come to court to prevent it. Such cases, I would have thought, would be comparatively rare. But one can see situations where, for example, a very damaging effect upon a child of the family might be such as to require such removal not to take place.

[17] I am bound say that, unless a very lengthy period was likely between the appeal being lodged and the hearing or the individual is in custody, it is difficult to see the point of exercising this power. It is particularly pointless if the individual is in work and providing for his or her family whilst in this country, because that would be removed and the likelihood is recourse to public funds by the family left here.

[18] However for some reason best known to the Secretary of State, that power has been required. In my judgment, it cannot be said that it is at all arguable that the Regulation as it stands is itself unlawful. Equally it would only be if the interim decision were unlawful and could be shown to be unlawful that it should not be permitted to be made.

[19] I would have thought it necessary for the Secretary of the State to use this power with the greatest of care because one wants to avoid any satellite litigation which might otherwise result. Surely, it should only be in a case where it can be seen to be desirable and really desirable that such powers should be exercised. It may depend on the view taken of the strength of the case which the Secretary of State has for removal in due course, but it may be obvious that there is little point in removing someone if it transpires that the appeal in due course is allowed."

The Notice of Decision

[26] The Notice of Decision in the instant case dealt with the decision to make a deportation order of the applicant under the Immigration (European Economic Area) Regulations 2006 ("the first decision ") and also, in the same document, the decision to remove him under Regulation 24AA notwithstanding that the appeal process had not yet begun and/or been exhausted. The SOSHD determined that the applicant would not face a real risk of serious irreversible harm if removed to

Lithuania pending his appeal and certified his removal under Regulation 24AA. The reasons for this decision were contained in the Notice of Decision.

[27] That section of the Notice of Decision dealing with the decision to make a deportation order under the 2006 Regulations recorded, inter alia, as follows:

- That he had committed serious criminal offences, that there was a real risk that he would re-offend in the future and that given the threat of serious harm that he posed to the public it was considered that his personal circumstances did not preclude his deportation. The decision to remove was declared to be justified, proportionate and in accordance with the principles of Regulation 21(5).

- Consideration was given to Article 8 of the European Convention on Human Rights.

- Although the Immigration Rules and Section 117(c) of the Nationality Immigration and Asylum Act 2002 did not apply to him directly, they were used as a guide for considering his Article 8 claim.

- It specifically mentioned that the Home Office's duty to safeguard the welfare of children as set out in Section 55 of the Borders, Citizenship and Immigration Act 2009 had been taken into account and the best interests of his children had been "a primary consideration in making this decision".

- It set out that the applicant had not provided any evidence of his child's existence, the domestic circumstances, the nature of his relationship with her or what was in her best interests. It was considered reasonable to expect that if he did have a genuine and subsisting parental relationship with his child, such evidence would have been available to him. He had not provided any reason why it was not reasonable to expect him to provide evidence in relation to the child.

- It went on to record that consideration of the child's best interests had been based on all the information and evidence currently available to the Home Office. Consideration had been given to the effect of deporting him and his child and whether the best interests of his child outweighed the public interest in deporting him.

- It was not accepted that the applicant had a genuine and subsisting parental relationship with his child. Such a relationship required a significant and meaningful positive involvement in a child's life and a significant degree of responsibility for the child's welfare. Since he had been subject to custodial sentences on at least five separate

occasions, his criminal activity did not demonstrate a positive involvement in the child's life nor did it demonstrate that he had considered any of his responsibilities for the child's welfare.

- It was not considered unduly harsh for the child to live in Lithuania or unduly harsh for the child to remain in the UK even though he was to be deported since the mother was living there and the child would be in her care.

- It was not accepted that it would be unduly harsh for his partner to live in Lithuania if she chose to do so.

[28] Turning to the Regulation 24AA of the 2006 Regulations consideration, the full *expres*s content of the reasoning in that particular section of the Notice of Decision was set out as follows:

> "Consideration has been given to whether your case should be certified under Regulation 24AA of the 2006 Regulations. 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 Lithuania is a Member State of the EU and the rights and freedoms of its citizens are broadly in line with those enjoyed here in the United Kingdom. Therefore it has been decided to certify your case under Regulation 24AA."

The grounds of appeal and the applicant's submissions

[29] The grounds on which leave was granted by Treacy J were as follows:

(1) Ground 4(a) – Breach of the applicant's and his partner's/children's right to respect for family life under Article 8 of the ECHR.

(2) Ground 4(b) – Exposing the applicant and his family to a real risk of serious and irreversible harm.

(3) Ground 4(c) – The decision ignored the welfare and best interests of the child's elder daughter B and is contrary to Section 55 of the UK Borders, Citizenship and Immigration Act 2009.

(4) Ground 4(d) – Failure to take into account the relevant Section 55 Policy Guidance.

(5) The decision is contrary to the requirements of procedural fairness and Home Office guidance insofar as the applicant was given no adequate opportunity to make representations as to whether or not Regulation 24AA should be applied to him, prior to the impugned decision being made.

[30] Accordingly the applicant seeks to have the impugned decision quashed and seeks an order of mandamus to compel the respondent to permit the applicant to remain in the UK pending his appeal. Alternatively the applicant seeks an order of mandamus to compel the respondent to reconsider the applicant's case afresh under Regulation 24AA.

[31] In pursuit of these grounds Mr McQuitty made the following arguments:

(a) This decision has been made as a matter of course without sufficient consideration or caution. The SOSHD has failed to recognise the draconian nature of the provision and has indiscriminately used this Regulation as evidenced by the guidance offered by the Secretary of State at paragraphs 3.1/3.2 and the statement of a Minister cited by the applicant, which was to the effect that Regulation 24AA should apply in all cases which would not result in irreversible harm.

(b) The right to family life of the applicant and his family, especially his daughter B, has been ignored insofar as this decision would result in an indefinite separation and a disproportionate interference with her rights.

(c) The Regulation 24AA decision does not refer to the child, her welfare or best interests. Insofar as it purports to be addressed in the substantive decision, that decision fails to recognise the genuine and subsisting parental relationship that exists, the child's settled life in Northern Ireland and the effective severing of the relationship with her father.

(d) By drawing an analogy with the Immigration Rules, the SOSHD has imputed a higher threshold regulation than is lawful.

(e) No attempt has been made to meaningfully engage with the child's welfare and best interests despite the perfunctory reference to Section 55 of the Borders, Citizenship and Immigration Act 2009.

(f) The SOSHD has failed to recognise that there are two distinct decisions with different factors operating in each case.

(g) The serious risk of irreversible harm test applies only to the person who is to be removed and not to the child.

(h) Inadequate advance notice was given to the applicant of the Regulation 24AA decision.

The respondent's submissions

[32] Mr Egan's contentions can be summarised broadly as follows:

(1) The Notice of Decision must be read as a whole. It provided detailed consideration of the effect on the applicant's family and the child B in the course of the deportation decision. Precisely the same considerations apply to the decision under Regulation 24AA. It is not logical to suggest that circumstances exist such that it would be proportionate to deport the applicant but disproportionate to certify his removal pending his appeal.

(2) The effect of the certification decision is limited to the period for appeal of the deportation decision. Accordingly, this period is only to be measured in weeks and it is anticipated the appeal will be heard some time in September 2015.

(3) The applicant has not identified any factual basis upon which it might be concluded that if the applicant's substantive deportation was proportionate, his interim removal pending his appeal was not. There is no evidence giving rise to a real risk of serious irreversible harm.

(4) At the time of the decision the appellant had not supplied any medical evidence to substantiate the health issues now raised concerning B or his partner. Even now his partner's health concerns are corroborated only by a note from the GP dated 4 December 2014 referring to "depression".

(5) Given the applicant's persistent criminal offending and time in prison, the SOSHD was entitled to conclude that the family could cope perfectly well without the applicant present.

(6) The fact that the Notice of Decision does not expressly refer to the guidance at s. 94B or the guidance under Section 55 of the 2009 Act, does not mean that they were not considered. It is unnecessary for a Notice of Decision to make reference to statutory guidance.

(7) Section 55 of the 2009 Act and the guidance thereunder provides that consultation should take place "wherever possible" and states "it will not always be possible to reach decisions with which the child will agree".

(8) If the applicant's appeal against a deportation decision is successful, the applicant will be restored to the UK and any harm that is "irreversible" will be remedied.

(9) The test of serious irreversible harm under Regulation 24AA applies both to the applicant and his family.

(10) There is no substance to the applicant's argument that the respondent had failed to notify him of the fact that consideration was being given to certifying his removal to Lithuania pursuant to Regulation 24AA.

Conclusion

[33] I have come to the conclusion that the impugned decision to deport the applicant pending his appeal pursuant to Regulation 24AA must be quashed and, if the SOSHD wishes to deport the applicant pending his appeal, I direct that the matter be remitted to the Respondent to reconsider the applicant's case afresh in the context of Regulation 24AA. This, of course, leaves untouched the first decision. I have come to this conclusion for the following reasons.

[34] First, I find in the Notice of Decision no evidence of the SOSHD having exercised her own judgment with regard to the criteria under Regulation 24AA after a proper appraisal of all the relevant circumstances. The Secretary of State must use this power with the greatest of care. The six lines dealing with the impugned decision under this Regulation betray no sense of separate consideration being given to this aspect of the decision.

[35] Brevity in decision-making can be a virtue and decision-makers should resist the potential for lateral spread, adopting wherever possible a tight internal frame to compress contents. Nonetheless, the terms of the written decision must be such that it is clear that the substance of the duty has been discharged (see Williams J in Re (TS) at paragraph [17] above). The brevity of the impugned decision in this instance, expressly instancing only the assertion that Lithuania is a Member State of the EU and that the rights and freedoms of its citizens are broadly in line with those enjoyed here in the United Kingdom, invites questions as to how robustly the test has been applied and how the risk of serious irreversible harm has been considered *under Regulation 24AA*. The possibility of a different outcome as to the two decisions needs to be investigated rather than blandly and casually assuming that the same result inevitably follows. I am unable to discern from the terms of this written decision that the substance of the duty cast on the SOSHD has been discharged under Regulation 24AA.

[36] Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant. While different SOSHDs might approach the question of the best

interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child maybe undervalued when other important considerations are in play. It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by other considerations. It requires a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment. I find that anxious scrutiny missing in this case in the context of Regulation 24AA.

[37] I make it clear that there is no algorithmic formula for distilling the contents of decisions in these matters. I have no doubt that it would be perfectly possible to craft a decision under Regulation 24AA which avoids tedious repetition and borrows much from the first decision earlier set out on the deportation itself. Indeed, it may well be that this is the approach that will be adopted if and when the matter is reconsidered by the SOSHD. I recognise also that the Secretary of State does not have to record and deal with every piece of evidence in her decision letter, nor does it have to make specific reference to statutory guidance. A felicitous marriage of theme and form is not always necessary, provided the substance is contained therein. On a purely factual analysis of this decision, it is the absence of substance that concerns me and I observe an unwelcome emptiness in the area dealing with Regulation 24AA. A decision that does not make even a reference to the child B represents all too casual an approach to this important task.

[38] When considering Article 8 of the Convention, the decision-maker has to assess the proportionality of the interference twithprivate and family life in the *particular circumstances and the context* in which the relevant decision is made. The interests of children command principled attention in our courts as reflected in Section 55 of the 2009 legislation. There are two distinct decisions being made here with reference to this family and in particular the child B. It does not necessarily follow that what is proportionate in the case of full deportation would be similarly considered to be proportionate when the need for separation would only be for a few weeks and the child could possibly be spared that particular severance pending the outcome of the appeal. The best interests of a child in each circumstance is an integral part of the proportionality assessment under Article 8 of the Convention and there is no substitute for a careful examination of all the relevant factors as they apply to each aspect of these two different decisions. It must be made clear that the substance of such a duty, particularly where children are involved, has been discharged. That has not been done in this instance and, accordingly, I have decided to quash the decision with the direction that, if the SOSHD still wishes to deport the applicant pending his appeal, the matter be remitted back to the SOSHD for further consideration of the impact of Regulation 24AA on the Article 8 rights of the applicant and his family.

[39] I pause to deal briefly with three other aspects of this case. First, I find no substance in the applicant's case that he did not receive notice advising him that consideration was being given to certifying his removal to Lithuania prior to making

that decision. I am fully satisfied that the overwhelming probability is that the letter which this applicant now admits that he received in prison but which he did not read or sign for or keep a copy of or provide a copy to his solicitor, was the notice in question. It is an entirely disingenuous attempt on his part to erect a technical hurdle against the respondent in this regard.

[40] Secondly, I am satisfied that there is no foundation in statute or in the authorities for distinguishing between the test of serious irreversible harm to be applied to the applicant on the one hand and to his family on the other under Regulation 24AA.

[41] Thirdly, whilst consultation of a child should be considered in such circumstances, much will depend upon the age and circumstances of the child, together with any information already before the SOSHD when the decision is made. I borrow again the wise words of McCloskey J in J and Others when he said at [13]:

> "… In the real world of immigration, the tools available to the court or tribunal considering this question will frequently, as in the present case, be confined to the application or submissions made to the Secretary of State and the ultimate letter of decision …"

[42] The failure to directly consult with the child in this instance would not have been sufficient to overturn the decision of the SOSHD in this instance.