Neutral Citation No: [2018] NIQB 89 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McC10787** ***Delivered:*** **15/11/2018**

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 EFE AND OOE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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[Ex tempore]

McCLOSKEY J

[1] This is a rolled-up hearing of an application for judicial review brought by two litigants to whom anonymity has been granted by the court. They are described as EFE and OOE (a minor) respectively. They will continue to have the benefit of anonymity and the standard provisions apply in that respect.

[2] The Applicants are both nationals of Nigeria. The first Applicant is the mother of the second Applicant, her son, who was born in 2006 and is now aged 12 years. They were formerly resident in the Republic of Ireland, arriving in the United Kingdom on 20 March 2013. This was followed by the registration of a claim for asylum.

[3] The court has been reminded that during the period of some five years which has elapsed since then the applications and claims by and on behalf of these two Applicants have generated around a dozen administrative (or executive) and judicial decisions of various kinds. The first-named Applicant brought an application for judicial review most recently in this court in 2017. This was a challenge to a decision of the Upper Tribunal to refuse permission to appeal against a decision of the First Tier Tribunal of November 2016 rejecting the first Applicant's appeal against a removal decision of the Secretary of State. In that appeal the Applicant invoked several provisions of the ECHR relying on section 6 of the Human Rights Act. Those provisions were articles 2, 3 and 8 respectively. The appeal against a decision to remove her from the United Kingdom was dismissed.

[4] More recently the Applicants have submitted further representations to the Secretary of State. These are dated 20 November 2017. These further representations gave rise to a decision dated 13 February 2018 rejecting the application thereby made on the basis that the representations did not give rise to a fresh human rights claim. It was therefore in consequence proposed to remove the Applicants from the United Kingdom. Chronologically, this decision stimulated a pre-action protocol letter which is dated 26 February 2018. It would appear from the evidence that the Secretary of State treated this letter as a further free-standing application, since the next development consisted of a Home Office letter dated 22 March 2018 addressed to the Applicants' solicitor. It begins with the sentence "Your application has been unsuccessful". It then cautions that the Applicants must leave the United Kingdom and that in default they will be liable to be detained and removed.

[5] This is the decision under challenge in these proceedings. Forensic analysis discloses that the two decisions are identical with the exception of the inclusion of seven new paragraphs in the more recent decision, namely that which is under challenge. These paragraphs are numbered 21-27. In very brief compass within these paragraphs the decision maker engaged with the further case made on behalf of the first Applicant based on health grounds. This was founded on a medical report which introduced to the equation novel issues relating to the first Applicant's mental health. This was the main evidential foundation for a new case made invoking article 3 ECHR and relying on the most recent jurisprudence of the Strasbourg Court, namely the decision in Paposhvili v Belgium [2016] ECHR 1113.

[6] In this decision letter, in common with its immediate predecessor, there is a section consisting of 19 paragraphs arranged under the rubric of "Exceptional Circumstances". This section begins with a reference to the existence of a child under the age of 18. That is plainly a reference to the person who is the second-named Applicant in these proceedings, namely the first Applicant's 12 year old son. The sentence is in the following terms:

> "As your client has a child under the age of 18 careful regard has been given to section 55 of the Borders, Citizenship and Immigration Act 2009 concerning the best interests of the child."

[7] The decision maker then purports to elaborate on certain aspects of the child's circumstances. These, in substance, are confined to one factor only. That appears in the immediately following sentence which is in these terms:

> "However, given that your client's child has only resided in the United Kingdom for approximately five years it is not accepted that he has lived in the United Kingdom for a sufficiently long period of time to have developed strong enough social or developmental ties whereby his

> removal to Nigeria within the context of the family unit would have a significantly adverse impact upon his emotional and behavioural development at this stage of his life."

This paragraph, fairly and broadly analysed, makes reference to only one aspect of the child's life, circumstances and situation, namely the length of time during which he has been present in the United Kingdom.

[8] Virtually all that follows is couched in general and abstract terms. In paragraph 45 there is a reference to the child being a Nigerian national: that may be said to be the second aspect of his personal life circumstances and situation which was expressly identified. Paragraph 47 refers to private ties made by the mother in the United Kingdom and says nothing about the child. Carefully analysed the remaining passages in this part of the letter are focussed either exclusively or predominantly on the mother. They are characterised by their detached and abstract nature. There is no engagement of substance in these passages with any actual facts or details pertaining to the child's life circumstances and situation. Indeed, it is almost certainly the case that many of these passages are pro-forma in nature.

[9] Against that background the court has in exchanges with the parties' respective counsel drawn particular attention to one of the grounds of challenge. This is found in paragraph 4(2) of the Order 53 Statement. This ground contends that contrary to section 55(3) of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act") the respondent has failed to have regard to the statutory guidance which is entitled "Every Child Matters – Change for Children" published in November 2009 and in particular specified provisions of that guidance. This is followed by some brief pleaded particulars. Section 55 of the 2009 Act has been considered in a series of judgments which I have given in this court and also in the Upper Tribunal Immigration and Asylum Chamber.

[10] Most recently in this court there is the case of ED [2018] NIQB 19. The text of section 55 is rehearsed in paragraph [11] of that judgment. The most striking feature of section 55 is its separation of the substantive duty enshrined in section 55(1) and the associated procedural duty contained in sub-section 3. The may be viewed as the servant, or handmaiden, of sub-section 1. It is plainly designed to ensure that the duty imposed by sub-section 1 is properly discharged in those cases in which it arises. I interpose in passing the observation that it is common case that section 55 applies in the present case and, therefore, governed the decision-making process and ensuing decision which are impugned in these proceedings.

[11] I refer to but do not repeat the observation contained in paragraph [15] of ED and the resume of the decision in JO (Nigeria) which one finds in paragraph [14]. In paragraph [16] the court said the following:

> "[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."

The court added:

> "[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 and conscientiously consider its contents. This elementary exercise would alert the decision maker in immigration and asylum cases to certain passages in particular."

The judgment then reproduces paragraphs 1.14, 1.15, 1.16, 2.06, 2.07 and 2.08 of the statutory guidance. In paragraph [19] the court acknowledged the significance of the qualifying words "wherever practicable" and "will not always be possible". It recognised that these draw attention to the practical reality of what may be expected of a decision maker in any given case. The judgment continues at paragraph [19]:

> "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 precondition 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."

[12] I would add that adherence to this requirement will have the further merit of increasing the prospects of exposing cases in which, for whatever reason, there has not been sufficient focus or concentration on the child in a case in which an application has been made to the Secretary of State, typically on behalf of two or more claimants, namely a parent or parents and a child. In making that observation

I do not overlook the impact of paragraph 353 of the Immigration Rules and, where appropriate, section 85 of the 2002 Act.

[13] In paragraph [20] of ED the court discusses the possibility that in the abstract there could be a case where, giving effect to the principle that substance prevails over form in certain juridical contexts, the decision maker has inadvertently and by good fortune reached a decision which in substance discharges the statutory obligation to have regard to the statutory guidance. The court developed this concept in the following way. It would be essential to construct an equation composed of three fundamental elements. First, all of the information concerning the affected child known to the decision maker, second, the impugned decision and third, the statutory guidance. The judgment in ED continues at paragraph [21]:

> "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 might 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."

[14] Turning to the content of the section 55(3) duty and for this purpose I do not have to stray beyond what is already rehearsed in paragraphs [17] and [18] of ED. In short, one finds in the statutory guidance what may be described as a minimum the possibility of certain steps being taken by the caseworker or decision maker. Each of these steps is designed to ensure that the decision maker properly discharges the inalienable duty under section 55(1)(a) of the 2009 Act of having regard to the need to safeguard and promote the welfare of the affected child or children concerned. In the abstract I find it very difficult indeed to conceive of a case in which a failure to perform the simple, uncomplicated exercise which is required as a matter of obligation by section 55(3) could in some way be excused or substituted. In principle, there are two possibilities:

(i) a finding by the court that the duty has in substance been discharged; and

(ii) a finding by the court that a failure to discharge the duty is of no material consequence.

[15] I turn to consider briefly the framework of the present case. The two successive decisions of the Secretary of State make no reference to section 55(3) of the 2009 Act. Nor do they make any reference to the statutory guidance, quote from any of its provisions, or refer in substance to what any of its provisions actually say. This is, therefore, a case of an abject failure to have regard to the statutory guidance whether expressly or by implication. The thrust of the submission developed on behalf of the Secretary of State by Mr Henry, of counsel, is that invoking paragraph

[20] of the decision in ED it can be demonstrated by reference to a series of evidential sources before the court that in substance the section 55(3) duty was observed by the decision maker in this case.

[16] I have adjourned this morning to re - examine the evidential sources in the papers on which the submission of Mr Henry is grounded. I have done that not least because the court cannot overlook the protracted history of this case and the prolonged engagement by the first and/or second Applicants with the Secretary of State in their immigration history. I have reviewed all of this evidence anxiously. Having done so, the court cannot be confident that clear, conscious and conscientious compliance with this mandatory – and absolute - requirement imposed by section 55(3) would have yielded the same outcome in the impugned decision with specific reference to the best interests of the second Applicant. I have come to the clear conclusion that this is not a case of fortuitous, subconscious compliance with the statutory guidance or immaterial and inconsequential non-compliance.

[17] I have not considered it necessary to examine the other grounds of challenge. I would add that the conduct of this hearing is a reflection of how the court is distributing its meagre and heavily pressed resources in accordance with the principles enshrined in the overriding objective in Order 1 Rule 1A of the Rules of the Court of Judicature.

[18] The outcome is that the application for judicial review in this rolled-up hearing succeeds on paragraph 2(4) of the Order 53 Statement. The remedy which flows from this is an obvious one. I give effect to the claim in paragraph 2(a) for an Order of Certiorari quashing the impugned decision of the Secretary of State. It is appropriate to add that as a matter of well-established public law duty the effect of a quashing order in this context is to require the Secretary of State to make a fresh decision with an open mind taking into account all available evidence, which might include further evidence or representations on behalf of the Applicants and duly guided and influenced by the judgment of this court. The Secretary of State may benefit from the further observation that in the event of a new decision being unfavourable to the Applicants and a further application for judicial review materialising this court would expect to find clear and unequivocal evidence that the exercise envisaged by the absolute duty imposed by section 55(3) of the 2009 Act has been dutifully, consciously and conscientiously carried out.

[19] The final order will include an order for costs in favour of the Applicants against the Respondent to be taxed in default of agreement and an order that the Applicants' costs be taxed to reflect their publicly funded status. Further, there shall be liberty to apply.

[20] Finally, it is appropriate to add that Mr Henry's submissions were an admirable rear-guard action and put the Secretary of State's case as forcefully as could have been advanced in the most unpromising of circumstances.