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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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IN THE MATTER OF AN APPLICATION BY AB
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

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McCLOSKEY LJ

Introduction

[1] These proceedings, which entail an application for leave to apply for judicial review, were initiated on 09 August 2018. The court made its first case management order on 03 September 2018. Further orders followed periodically. Progress ever since has been disappointingly laboured. It would be unprofitable and wasteful of scarce judicial resources to explore the reasons for this. Ultimately an *inter–partes* hearing was conducted on 07 January 2020.

The Impugned Decision

[2] The Applicant challenges the decision of the Secretary of State for the Home Department ("*SSHD*") dated 09 May 2018, whereby it was determined, applying paragraph 353 of the Immigration Rules, that an earlier decision refusing his application for asylum, thereby requiring him to depart the United Kingdom ("*UK*"), would stand.

History

[3] The following does not purport to be an exhaustive chronology:

(a) The Applicant is a national of Nigeria now aged 42 years.

(b) He claims to have been the subject of threats and four separate assaults by unknown persons in Nigeria between November 2012 and October 2013.

(c) He asserts that he was a practising barrister in Nigeria from 2011.

(d) He was married to a Nigerian national on 31 January 2013.

(e) He was in the UK for an unspecified period, on honeymoon, circa September 2013.

(f) Having returned to Nigeria he re-entered the UK on 04 November 2013.

(g) He claimed asylum in the UK on 28 November 2013.

(h) The first child of the family was born in Belfast on 05 December 2013.

(i) His substantive asylum interview was conducted on 10 December 2013.

(j) By a decision dated 11 August 2014 SSHD refused the Applicant's asylum application.

(k) On 08 September 2015 the First-tier Tribunal ("*FtT*") dismissed the ensuing appeal.

(l) On 25 November 2015 the Upper Tribunal refused permission to appeal.

(m) On 21 December 2015 the Applicant made further representations (or "submissions") in writing to SSHD.

(n) On 09 February 2016 SSHD rejected the further representations.

(o) On 09 February 2016 a PAP letter was written.

(p) On 24 February 2016 SSHD responded to the PAP letter.

(q) On 12 September 2017 the Applicant made a further set of further representations to SSHD.

(r) By a further decision of 09 May 2018 – the impugned decision – these were rejected.

[4] During the intervening period two further children of the family were born, in February 2015 and April 2017 respectively. On the date when the first set of

further representations was transmitted there were two children of the family, then aged two years and ten months respectively. By the date of the impugned decision there was a third child of the family, then aged 13 months.

[5] In the initial asylum screening interview conducted on 28 November 2013 the Applicant made the following case:

> "*We came to the UK for security. I am afraid of the government because they are after my life and wife and unborn baby … I can't return to Nigeria because I will be killed by the government people and the agents of People Democratic Party …*
>
> *I filed a court case against the Delta State Government of Nigeria and it was reported by Nation Newspaper in Nigeria …* (providing the website details)".

[6] The substantive asylum interview was conducted on 10 December 2013. The Applicant was asked why he did not claim asylum upon entering the UK. His response was, in terms, that he did not think of this possibility immediately. Having spent an initial period in London they travelled to Belfast. He was unable to provide any documentary evidence of his asserted legal qualifications. Elaborating on the legal proceedings in Nigeria he stated "*… I took the Government to court and represented myself in court … the summons was dated 14th November 2012 …..* [Why?] *… corruption is rampant in Nigeria. It is everywhere, it is in our Government, me as a lawyer I took it upon myself to correct some of this corruption in my country*". Expanding further he stated that he had challenged the purported execution of an instrument of (apparently) subordinate legislation by a Government secretary who was not competent to do so.

[7] The Applicant claimed that both he and his wife began receiving threats by telephone from unnamed persons warning him that the law suit must be discontinued. He was assaulted outside the court building following a hearing of the case. He left his law suit file behind in Nigeria. The telephone threats dated from November 2012 and their frequency was around three times weekly. He claimed "*… they are after my life, there were attempts to kill me …*" (The details of this were not probed by the interviewer.) His assailants outside the courthouse wore pro-PDP ("Peoples' Democratic Party") t-shirts. To have reported this incident to the police would have been pointless.

[8] Next, in February 2013, a taxi in which the Applicant was travelling for work purposes was "*crossed*" by another vehicle, resulting in the taxi somersaulting and the occupants' flight from the scene, pursued by armed men. He claimed that this incident was reported in three national newspapers and he made prints of these reports in Nigeria. Some five months later a similar vehicle incident occurred. His assailants threatened him with death on account of the law suit. They fled upon the advent of a joint military and police task force vehicle. Some three months later,

having returned from their honeymoon, the Applicant observed eight fully armed men outside his house, he and his wife fled to the roof space, the armed men entered the building, they searched (ransacked?) the house and made further audible threats to their lives. The Applicant then described their honeymoon in London. No dates were specified. Having returned to Nigeria they left for Lagos on 06 October 2013, remaining there with his wife's family until 02 November 2013. (As noted above, their travel to the UK was on the following two dates.)

[9] The asylum refusal decision of 08 August 2014 is contained in a six page letter. The essence of the refusal decision was that the Applicant's claim was considered not credible. More specifically (per the decision maker):

(a) He had not provided any supporting documentary evidence.

(b) He had failed to demonstrate that he is a qualified lawyer.

(c) He had been unable to specify the number of court appearances relating to his asserted law suit against the State Government.

(d) His credibility was undermined by his failure to provide any documents relating to the law suit or "*any court records*"; his failure and that of his wife to change their mobile phones following the onset of the alleged threats; his provision of only one newspaper article wherein "*… there is no mention of you being attacked outside the court …*"; his lack of contact with the lawyer whom he asserted had been representing him in the law suit following his flight to the UK; his inability to state whether the taxi driver reported the relevant attack to the police; his speculative assertion that the assailants involved in the first vehicle incident were PDP members; the incredulous nature of his claim that on the occasion of the second vehicle incident his assailants fled on foot, rather than in their vehicle and left their vehicle behind as incriminating evidence; his conflicting claims that the next attack occurred on the date when they returned from honeymoon (06 October 2013) and his statement during interview that they had been on honeymoon from 06 September to 27 September 2013; his failure to mention in the asylum interview that he had previously been refused a visa for the purpose of visiting Ireland; and, finally, the conflict between his asserted security concerns and the availability of his name and photograph on the Belfast Rotary Club website, which was considered "*… not consistent with someone who doesn't even tell their family* [or his Nigerian lawyer and colleague] *where they are living for security reasons*".

[10] The consequential conclusion yielded by all of the foregoing was expressed in these terms:

> "*In light of the inconsistencies and lack of credibility with your account, your claim to have been threatened and intimidated because of a law suit you filed against the Delta State Government has therefore been found to be unsubstantiated.*"

The decision maker's alternative conclusion was that safe relocation within Nigeria would be feasible for the Applicant. The decision states at [49]:

> "*Therefore based on the individual circumstances of your claim and the background information above, you have not shown that it would be unreasonable to expect you to live anywhere outside Delta State in Nigeria.*"

One of the ingredients of this conclusion was the description of the Applicant as "*… well educated to degree level and …. previously … employed in Nigeria*".

[11] The asylum refusal decision had four further elements:

(a) A conclusion that the Applicant did not qualify for humanitarian protection.

(b) A conclusion that his return to Nigeria would not violate Article 2 ECHR.

(c) *Ditto* Article 3 ECHR.

(d) A further conclusion that to return to Nigeria would not infringe the rights of any relevant person contrary to Article 8 ECHR:

> "*… you and your wife arrived in the UK on 04 November 2013. Therefore, you and your wife have spent less than 20 years in the UK and you have not demonstrated that there would be very significant obstacles to your integration into Nigeria. Your son was born in the UK on 05 December 2013. He has spent less than 7 years in the UK and it would not be unreasonable for him to leave the UK with his parents.*"

This passage appears on the penultimate page of the decision letter. On the second page one finds the following passage:

> "***Section 55***
>
> *Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to carry out its existing functions in a way that takes*

> *into account the need to safeguard and promote the welfare of children in the UK. In dealing with your application, I have taken this into account.*"

[12] Chronologically, the next landmark event was the decision of the FtT, promulgated on 08 September 2015, dismissing the ensuing appeal against the asylum refusal decision. The three Appellants were the Applicant, his spouse and the oldest child of the family (the second child having been born some six months before the hearing). The appeal was dismissed in robust terms. The tribunal's omnibus conclusion is expressed in [31], per Immigration Judge Fox, thus:

> "*I find that the core of the Appellant's account of persecution lacks credibility and is a fabrication designed to gain access to the United Kingdom. I find that the Appellants are in reality economic migrants who have fabricated a claim of persecution in order to gain entry to the United Kingdom.*"

The reasons underpinning this conclusion are rehearsed extensively in the preceding paragraphs, particularly at [19]–[30]. In summary, the tribunal made wholesale assessments, findings and conclusions comprehensively undermining the believability of the appellants' case.

[13] The Applicant made further representations to SSHD some three months later. The essence of these was:

> "*I have obtained original documentation to add to the veracity of my original asylum claim …*"

The documents provided were:

(a) A medical practitioner's letter confirming how the Applicant's father had died.

(b) A medical certificate of the cause of his father's death.

(c) Three affidavits.

(d) Three internet articles.

In section 3 of the completed pro-forma the Applicant was asked to indicate any asserted change in his circumstances, replying:

> "*Son born 05-12-13. We have lived here for over two years now. My son is nearly ready for pre-school. We are settled here.*"

The pro-forma was completed by the Applicant's solicitor. The first two of the newly produced documents recorded a history of heart symptoms affecting the Applicant's father "*… following several calls he got from some unknown persons who insisted he should produce his son barrister …. who was said to be their target. They have threatened they will take his life instead if he failed to produce his son*". This history was *ex facie* recorded upon the father's presentation to a clinic on 05 March 2015 and he died of hypertension and a heart attack five days later.

[14] The next new document purported to be an affidavit sworn by the Applicant's mother which purported to corroborate the aforementioned medical information. The fourth new document was an affidavit purporting to be sworn by a person claiming to be the landlord of the premises in which the alleged attack of 06 October 2013 had occurred and adding details such as a report from "*my private security men*", witnessing the armed assailants damaging the entrance door and repairing same on the same date. The fifth of the new documents was an affidavit purportedly sworn by a Nigerian qualified legal practitioner with whom the Applicant had previously worked briefly and who claimed to have witnessed the alleged assault on him outside the relevant court premises on 18 January 2013. Finally, there were three internet news articles: the first and second, bearing the dates 28 and 31 March 2014 respectively, related to the deaths of two lawyers in the Delta State on 27 March 2014 and a consequential police investigation. The third described the alleged co-operation of Nigerian police with criminals in the context of certain local elections held on 24 September 2015.

[15] The presentation of the foregoing further representations and purported new evidence stimulated a further decision of SSHD, dated 28 January 2016. The essence of this decision, rejecting the further representations, was threefold: the two new medical documents were not considered genuine, the three new affidavits did not prove the persecution claimed by the Applicant and, finally, *ditto*, the newspaper articles. In a separate section of the decision letter it was concluded that to reject the further representations would not infringe Article 8 ECHR. In a further separate section, under the rubric "*Exceptional Circumstances*", the author noted the factor of the two children and concluded that having regard to their ages and the duration of their sojourn in the UK their best interests would not be infringed in the event of the entire family returning to Nigeria.

[16] Following the PAP skirmish noted in [3] above, the next material event was the transmission of further representations on behalf of the Appellant on 12 September 2017. Once again the appropriate pro-forma was completed and the Applicant was legally represented. The essence of these further representations was:

> "*New evidence from home to prove the credibility of my claims which were not previously accepted. These documents are original newspaper articles – totally verifiable by the Home Office.*"

The documents provided consisted of three 2016 newspaper articles, a 2016 hospital letter and a DHL envelope. By this stage there were three undisputed facts: the Applicant is a qualified lawyer who previously practised in Nigeria; he is of Nigerian nationality; and he had brought the relevant law suit.

[17] These further representations gave rise to yet another negative decision, the main elements whereof were the following: the hospital letter, taken at its zenith, "*… does not provide any connection with* [the mother's] *assault to [*sic] *yourself*"; the new newspaper articles would not "*… create a realistic prospect of success*" in the event of a further tribunal appeal; the migration of the family to Nigeria would not violate any person's Article 8 rights; no exceptional circumstances had been demonstrated and, in particular, the migration of the entire family unit to Nigeria would be compatible with the best interests of the children. This is the decision impugned in these proceedings.

The Judicial Review Challenge

[18] The Applicant's case, in a nutshell, focuses on the following passages in the impugned decision letter:

> "***Exceptional circumstances***
>
> *Consideration has been given to whether there are exceptional circumstances in your case which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for you, a relevant child or another family member. In so doing we have taken into account the best interests of any relevant child as a primary consideration. Based on the information you have provided we have decided that there are no such exceptional circumstances in your case that would warrant a grant of leave to remain outside the Immigration Rules.*

And the following later passage:

> "*You failed to demonstrate any reasons why your children cannot return to Nigeria with you and your partner and continue your family life there. It is considered that it is in the best interest of the children. Your children are now aged 4, 3 and 1 years old, it is not considered that they have spent their formative years in the UK. It is believed you may return to Nigeria as a family unit. …*
>
> *The best interests of the child will normally be met by remaining with their parents and returning with them to the country of origin, subject to considerations such as long residence and exceptional factors. Your children have lived*

> *in the UK for 4, 3 and 1 year respectively, it is not accepted that this is a significant period of time. It is not accepted that your children are at an age where they could not adapt to life in Nigeria. You have provided no evidence of any insurmountable obstacles to your returning to Nigeria with your partner and child and continuing your relationship there …*
>
> ***In coming to this decision, regard has been given to the statutory guidance to the Home Office making arrangements to safeguard and promote the welfare of children 'Every Child Matters: Change for Children', issued under section 55 of the Borders, Citizenship and Immigration Act 2009 ["the 2009 Act"].*** *It has therefore been decided that there are no exceptional circumstances in your case. Consequently your application does not fall for a grant of leave outside the Rules.*"
>
> [Emphasis added]

The impugned decision entailed the application of paragraph 353 of the Immigration Rules, giving rise to a conclusion that the Applicant's further representations did not amount to a fresh claim within the terms of this provision.

[19] The submissions of Mr Seamus Lannon (of counsel) on behalf of the Applicant were based on both s 55(1) and, more emphatically, s 55(3) of the 2009 Act, the recent decision of the Northern Ireland Court of Appeal in *JG v Upper Tribunal, Immigration and Asylum Chamber* [2019] NICA 27 and the statutory guidance quoted in the immediately preceding paragraph. Mr Lannon in particular contrasted the terms of the decision letter with the specific and exacting requirements of the statutory guidance. He invoked the *JG* formula, at [24] of "*a conscious and conscientious assessment of the child's best interests by the decision maker*". I observe that this, of course, is but the first step – albeit a vital one – in every section 55(1) exercise. The best interests of the child concerned once identified, these must be treated as a primary consideration. As the decision in *ZH (Tanzania)* [2011] UKSC 4 and *Zoumbas –v– Secretary of State for the Home Department* [2012] 1 WLR 3690 make clear, the child's best interests, once assessed, must be accorded a primacy of importance by the decision maker.

[20] On behalf of SSHD Mr Philip Henry (of counsel), questioned whether the Applicant had discharged his duty of candour to the court by failing to include within his evidence bundle the decision of the FtT. Second, he submitted that the Applicant's case is couched in unmistakably vague terms. Third, he sought to meet the Applicant's s 55 case in the following way (per his second skeleton argument):

> "*In **JG v SSHD** the decision maker failed to make any reference whatsoever to the section 55 statutory guidance. The Court of Appeal concluded that in the circumstances of that case adherence to the policy would have prompted a range of enquiries that had a realistic prospect of changing the outcome and therefore the breach was 'material', therefore the impugned decision was overturned ….*"

Followed by:

> "[The children] *were too young for the type of enquiry envisaged by the guidance …*
>
> *The guidance itself refers to ascertaining the wishes and feelings of the child 'where possible', clearly identifying that there are limiting factors, such as age ….*
>
> *The Applicant has been unable to coherently explain what (evidentially) was omitted from consideration by the decision maker and how it might have resulted in a different outcome.*"

And finally:

> "*Most important of all, the Applicant has been unable to explain to this court in evidence (or even in a submission unsupported by evidence) what evidence the decision maker ought to have obtained by way of enquiry. This is telling. The fact that the bare complaint is made informs this court that there is no substance to it. The children were too young to express a meaningful opinion on which country they prefer to live in, so there was no purpose in making such an enquiry. They were not in school, so no enquiry of that nature ought to have been made. The children had no medical problems, so no enquiry of that nature ought to have been made. They had no other social services or other specialist needs that might have prompted an enquiry.*"

Mr Henry's final submission had two components. First, there has been no breach of the s 55(3) duty. In the alternative, any such breach was not material and adherence would not realistically have altered the impugned decision.

[21] At the stage when the Applicant made his final collection of further representations to SSHD he had ample opportunity to formulate submissions relating specifically to the best interests of each of his children and to provide such supporting evidence as he desired. All that he managed to muster, with the assistance of legal advice, was the following:

> "*Article 8 right to private and family life. Best interests of the children not considered.*"

This perfunctory formulation was devoid of particulars and specificity and, furthermore, unsupported by any accompanying evidence relating to the best interests of any of the children. Objectively, this unfolded against the protracted immigration history and background noted in [3] above. Furthermore, the context included previous decisions, both administrative and judicial, adverse to the Applicant and his family. Other aspects of the context were the Applicant's legal qualifications and the fact of his legal representation. In all of these circumstances I hold that the decision making officials concerned were entitled to consider that there had been no failure to bring to their attention anything of a material nature bearing on the children's best interests. There was no reason to take any of the further investigative or evidence gathering steps contemplated in the statutory guidance, no impetus for doing so.

[22] The specific issue of the age of the children features in the submissions of Mr Henry. Given the analysis in the foregoing paragraph I accept that in this case the fact that none of SSHD's officials interviewed any of the children is a matter of no material consequence. There was no reason why this step should be taken. However, the court deliberately stops short of any broader suggestion that there will never, or even normally, be no point in interviewing young children. It is well known that all manner of skills and expertise can be deployed in this kind of exercise nowadays. In short, if there is good reason to interview a child potentially affected by the decision to be made on behalf of SSHD the effect of the statutory guidance is that this step must be taken. The efficacious protection of this most vulnerable cohort demands nothing less.

[23] The decision maker did himself/herself no favours whatsoever in employing the bare and formulaic terms of the passages reproduced in [18] above. I have highlighted the lack of substance and particularity in the Applicant's section 55 case, evidentially. The decision letter on behalf of SSHD invites precisely the same criticism. No attempt was made to explain, even in the most basic terms, how "*regard*" had allegedly been given to the statutory guidance. Furthermore, the claim that the guidance had been considered is followed at once by a conclusion that there were no exceptional circumstances in the case. The factor of exceptional circumstances has nothing to do with the section 55 duties.

[24] However, the merit of the decision letter in this respect is that the terms in which the children's best interests were described cannot in my judgement be faulted. In this fact sensitive case there was nothing complex, unusual or obscure relating to the children's best interests. This equation was simple and uncomplicated. The effect of the impugned decision was that the Applicant, the father of the family, would have to depart the UK to Nigeria and the strong expectation which the decision maker was entitled to hold was that the mother and

the three children would do likewise, thereby maintaining the family unit indefinitely in the parents' country of origin. There was no educational, medical, psychological, community or other kindred factor to be reckoned. This was an uncluttered case inviting a straightforward, unsophisticated approach on the part of the decision maker.

Conclusion

[25] Giving effect to the foregoing analysis, the court concludes that no breach of either section 55(1) or section 55(3) of the 2009 Act has been demonstrated. The first of these conclusions is unhesitating. The second, while less clear cut, is nonetheless warranted on the basis that the court will assume, absent any evidence to the contrary, that a public official in legal proceedings in which candour is of paramount importance has engaged in no deceit or slight of hand in the unequivocal, though bare, assertion that the statutory guidance was considered in making the impugned decision. As this judgment shows claims of this kind will be rigorously tested by the courts in every case having regard to the vulnerability of children generally and the conventional absence of separate legal representation for them in this kind of case.

[26] The court adopts Mr Henry's alterative conclusion. If and insofar as there has been any failure to properly ie in the language of *JG* in a "*conscious and conscientious*" manner to have regard to the statutory guidance, in this fact sensitive case such failure is of no material moment. Generally, it is to be expected that cases in which this conclusion is justified will be few in number.

[27] The threshold for the grant of leave is overcome. I grant leave to apply for judicial review. Adopting the "*rolled up*" approach, to which no party objected and which is manifestly appropriate in this case as all material evidence has been assembled bilaterally (painstakingly so) and the parties' arguments have been formulated and updated, both in writing and orally, over a protracted period, I dismiss the application substantively.

[28] Independently of the above conclusion I hold that the Applicant has failed to discharge his duty of candour to this court. He has continued to rely on assertions and documents found to be false or otherwise unreliable by the relevant fact finding judicial agency namely the FtT; he has persistently failed to place relevant documents before this court, notwithstanding repeated opportunities to do so; and he has failed to account for any of the foregoing in affidavit evidence. The court cannot avoid the observation that such egregious defaults can have unjustified deleterious consequences for members of the cohort of genuine asylum and immigration claimants. Thus conduct of this kind is in the highest degree irresponsible and reckless, in addition to being antithetical to the rule of law.