Neutral Citation: [2018] NIQB 18 | *Ref:* **KEE10574**

Judgment: approved by the Court for handing down | *Delivered:* **1/3/18**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY LH2 AND OTHERS FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT TO REFUSE TO GRANT LEAVE TO REMAIN, TO CERTIFY THE APPLICANTS' CLAIMS AS CLEARLY UNFOUNDED AND TO REFUSE TO GRANT AN IN-COUNTRY RIGHT OF APPEAL OF 20 JULY 2017

KEEGAN J

I have anonymised this judgment given that it involves two children and their identities should be protected. Nothing must be published which would identify the children or their family.

[1] This is a challenge brought by four members of a Ukrainian family namely a mother, a father and children aged 2 and 6 years respectively. The challenge is brought against the Home Secretary's decision comprised in a decision-making letter dated 20 July 2017 which refused the applicants' human rights claim pursuant to Article 8 of the European Convention on Human Rights ("ECHR") for leave to remain in the United Kingdom. The decision also certified the claim as clearly unfounded under section 94(3) of the Nationality, Immigration and Asylum Act 2002. As a result of this decision the applicants are prevented from having an in-country right of appeal to a specialist Immigration Tribunal as their right of appeal from the decision is exercisable only on an out of country basis.

[2] Leave to apply for judicial review was granted by McCloskey J on 27 October 2017. Mr Bassett appeared on behalf of the applicants. Mr Kennedy BL appeared on behalf of the respondent. I am grateful to both counsel for their impressive oral and written arguments.

[3] The applicants seek orders of certiorari and a declaration. The grounds for challenge advanced at the hearing are those contained within the amended Order 53 Statement at paragraphs 3(a) to (d) as follows:

(a) The decision of the respondent to refuse to grant leave to remain is contrary to section 6 of the Human Rights Act 1998 read together with article 8 of the ECHR as it constitutes a disproportionate interference with the right to respect for family life and private life. In particular –

(i) The decision of the respondent amounts to a disproportionate interference with the right to respect for family life of the applicants as it is unreasonable to expect the applicants to relocate to Ukraine in order to continue to enjoy a family life together.

(ii) The decision of the respondent amounts to a disproportionate interference with the right to respect for private life of each of the applicants in its relocation to Ukraine, and the consequent disruption of all existing social ties in Northern Ireland, is not necessary in a democratic society in order to achieve the legitimate state aims of protecting the rights of others and economic well-being.

(iii) In relation to the third and fourth applicants namely the children, the decisions of the respondent amount to a disproportionate interference with the right to respect for family life as it has failed to address whether the best interests of the children lie with the family remaining together in the United Kingdom or with relocation to Ukraine.

(b) The decision of the respondent to refuse to grant leave to remain is contrary to section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55 of the 2009 Act") as it cannot be said to be consistent with the duty to promote and safeguard the welfare of children. In particular,

(i) The respondent has failed to expressly identify whether the best interests of the third and fourth applicants is a continuation of residence in Northern Ireland with their parents or relocation to Ukraine with their parents and to take such an outcome into consideration.

(ii) The respondent has assumed that the applicants must have connections and/or family support in Ukraine which would facilitate integration should they be deported. Such assumptions are inconsistent with the correct approach to section 55 as set out by Mr Justice Stephens in Re ALJ [2013] NIQB 88 at paragraphs 91 to 109. The decision-maker must assess the position on the basis of evidence rather than assumptions.

(c) The decision of the respondent to certify each of the claims as clearly unfounded is unreasonable and contrary to section 94 of the Nationality, Immigration and Asylum Act 2002 in particular –

(i) On the basis of the materials placed before the respondent it was not reasonably open to her to conclude that the appeals of each applicant was certain to be dismissed by the First Tier Tribunal (IAC).

(d) The decision of the respondent to refuse to grant an in-country right of appeal is contrary to section 6 of the Human Rights Act 1998 as it deprives the applicants of the procedural right to effective remedy as protected by article 8 of the ECHR. The decision of the respondent in respect of each applicant is contrary to the judgment of the UK Supreme Court in the case of R (Kiarie) v Secretary of State for the Home Department [2017] UKSC 42. During the hearing Mr Bassett and Mr Kennedy helpfully agreed that if the court was minded to decide that the certification of the human rights claim as clearly unfounded succeeded the issue of an appeal in-country automatically follows and so that ground is not necessary.

[4] The four pleaded grounds are all interrelated and are directed towards the certification decision. However this case can be distilled down to two key issues which emanate from the article 8 claim namely:

a. whether the best interests of the children were properly assessed by the decision maker pursuant to the section 55 duty.

b. whether an out of country appeal represents a breach of the procedural right contained within article 8.

[5] The chronology of decision making is as follows:

- 16 November 2016, the applicants send correspondence through Mr Natur Solicitor which raises a human rights claim with enclosures in relation to the family situation in Northern Ireland and the situation in Ukraine.

- 25 May 2017, the respondent replies inviting an asylum claim

- No asylum claim is pursued

- 20 July 2017, the respondent refuses the applicant's human rights claim and certifies it as clearly unfounded

- 7 August 2017, pre-proceedings correspondence is sent by Mr Natur

- 16 August 2017, the respondent replies to the pre-proceedings correspondence maintaining the decision reached on 20 July 2017

The evidence of the applicants

[6] The first named applicant ("the applicant") filed a grounding affidavit dated 19 October 2017. She also filed a supplemental affidavit of 6 November 2017 which deals in detail with the situation in Ukraine were the family to be returned there. The instructing solicitor Mr Natur also filed an affidavit dated 6 November 2017. The grounding affidavit sets out the fact that the applicant is a Ukrainian national. It refers to the fact that her partner is also a Ukrainian national. The applicant states that she lawfully entered the United Kingdom on 17 August 2006. She states that prior to her arrival in the United Kingdom she obtained a work permit and an entry clearance visa giving her leave to remain for 12 months. She states she worked on a farm as a mushroom picker. The applicant avers that she met her partner on 18 August 2006 on the day she arrived in Northern Ireland from England. She states that her partner had already arrived in Northern Ireland from the United Kingdom on 10 April 2005. The applicant avers that he entered the UK lawfully as well having obtained a work permit and an entry clearance visa to work on a farm.

[7] The applicant avers that the relationship between her and her partner developed and they had two children in Northern Ireland born in 2011 and 2015. The applicant contends that she has established family and private life in the United Kingdom, integrated in Northern Irish community, made friends and had become part of the Northern Irish community. In particular the applicant points to the fact that the eldest child attends a primary school and she relies upon evidence filed from the primary school.

[8] In her grounding affidavit the applicant accepts that she and her partner have overstayed their visas in the United Kingdom. She also points out that the armed conflict in Ukraine began in 2014. Reference is then made to the fact that Immigration Officers raided the home on 19 March 2014 and the applicant's partner was detained in England for a period of time. They were both issued with temporary admission with reporting conditions and prohibition to undertake employment. The applicant avers that she has complied with the immigration conditions placed upon her.

[9] In the supplementary affidavit the applicant explains that she grew up in the Sumy area of Ukraine which is located in eastern Ukraine close to the border of Russia. She states that the area has remained within the control of the Ukrainian Government but that she has been told that many people have joined local defence militias in case the fighting spreads. The applicant avers that when growing up she spoke both Russian and Ukrainian but that her household was mainly Russian speaking although she was taught Ukrainian in school. The applicant states that her parents do not live together anymore as they separated some time ago. She states she has limited contact with them mainly by telephone contact a couple of times a year. She states unfortunately her parents both misuse alcohol and she has grown apart from them. She says the village they currently live in is called Sai. The

applicant avers that it is very small and located outside Sumy. She states there are no opportunities for work there and the accommodation is limited. She avers that her brother has moved away from Sumy and currently lives in Kharkiv. The applicant avers that he is married and lives with his wife and daughter in his mother-in-law's house in that city so she could not impose upon him. The applicant avers that she has not been back to Ukraine since 2007.

[10] The applicant then provides some information about her partner. She states that he grew up in Nizhyn in the Nizhyn area of Ukraine, which is located in central Ukraine north-east of Kiev. She states that her partner spoke both Russian and Ukrainian when he was growing up. She states that this area also remains within the control of the Ukrainian Government but it too has seen the recruitment and formation of local defence militias. She states that her partner's family continue to live in Nizhyn however they look after their great-grandmother who needs full-time care. She refers to the fact that her partner has a sister who lives in the area who is married with children. She states that her partner has remained in contact with family members but they would not be able to assist with accommodation or childcare.

[11] Attached to the affidavit the applicant has provided travel advice from the Foreign and Commonwealth Office and from the Department of Foreign Affairs in relation to the instability in Ukraine. She avers that the current political and military crisis in Ukraine is continuing. She points out that there was a Russian invasion of Crimea in March 2014. She says that since then there has been a war in Donbass. The fighting has led to many people fleeing Donetsk and Luhansk and neighbouring areas.

[12] In the evidence she has filed the applicant contends that if she was to return to Ukraine with the family she would have no idea where she would live and whether she could find work. She says there are lots of refugees from the fighting in the cities. The applicant also states that if she were to return to Ukraine she does not understand how she could possibly participate in an Immigration Appeal. She says she does not have family there who would be able to put them up. She says that she does not know if public housing would be available on return, there is a severe work shortage in the country, she does not understand that she would be entitled to social security assistance, she does not understand where she would find a suitable venue to participate in the hearing, she points out that she would need an interpreter, she is concerned about the securing of legal representation. The applicant avers that if the appeal hearing was to be conducted by way of video or audio with the family in Ukraine she does not see how she would be able to consult properly with her representatives or participate properly.

[13] In this affidavit the applicant refers to the children and in particular that any relocation to Ukraine would disrupt the children's schooling. She refers to the fact that her eldest child is doing really well in school at the moment and that he also participates in a lot of afterschool activities. She refers to the fact that this child

speaks English with his friends in school and whilst he does speak Russian at home English is his first language. He does not speak any Ukrainian. The applicant avers that schools in Ukraine teach through the medium of Ukrainian and his education would be disturbed if he were to relocate to Ukraine. She also refers to the difficulties in adapting to a new school.

[14] The affidavit of Mr Natur refers to his experience in working in this area and that the oral evidence of the appellants in appeals can be crucial in the determination of an appeal. He also says that it has been his experience that giving advice and taking instructions from clients before and during the hearing is essential. He says he cannot see how these applicants could hope to overcome the financial and logistical problems that would come with trying to participate in an appeal while they were in Ukraine. He states that it is incredibly difficult to see how they could afford legal representation, IT equipment, translation services, venue hire and accommodation. He also states that the appeals would require the attendance of others potentially who could speak to the family life in Northern Ireland and this would be more difficult if the family were forced to return to Ukraine before hearing. Finally he says it is his considered view that the grant of legal aid is made less likely where the respondent has certificated the claim as clearly unfounded and the appellants have already left the jurisdiction. There is substantial supporting evidence in the papers about the family life that the applicant and her partner and children have established in Northern Ireland by way of the children's schooling, other activities and involvement with the church and society. The applicant also refers to undertaking English classes along with her partner. The applicant makes reference to the situation in Ukraine and whilst the area that she comes from is not the actual area of conflict the case is made that there is a problem with the country in terms of it being a warzone.

Submissions made by the parties

[15] Mr Bassett, on behalf of the applicants, made the following points:

(i) In relation to the first ground of challenge Mr Bassett argued that article 8 is engaged both as regards family and private life and applying the law in this area he contended that the decision to refuse leave to remain is disproportionate. He relied on the case of Zoumbas v SSHD [2013] UKSC 10 which sets out the approach to immigration decisions involving children and in particular that the best interests of the child are an integral part of the proportionality assessment under article 8 of the Convention.

(ii) Turning specifically to the best interests of the children, Mr Bassett argued that this decision offends section 55 of the Border Citizenship and Immigration Act 2009 given that the best interests of the children have not been carefully assessed, identified and given that the welfare of the children is a much wider inquiry than an inquiry as to whether there is a real risk of a breach of a fundamental right under the ECHR.

(iii) In relation to the certification of the claim as clearly unfounded under section 94(1) of the Nationality, Immigration and Asylum Act 2002, Mr Bassett pointed out that the test in relation to this is extremely high. He relied on R(NK) Pakistan v SSHD [2012] EWCA Civ 1145 where the Court of Appeal quashed the decision to certify a claim as clearly unfounded where there was a need for specific inquiries as to whether in the individual circumstances of the appellant's case adequate protection would be available to her and whether she could internally relocate. Mr Bassett argued that it cannot be said that the applicants are completely and utterly without hope of succeeding in their appeals.

(iv) In relation to consideration of the best interests of the child and/or the article 8 claim in general, Mr Bassett argued that the decision-making letter conspicuously fails to take into account the effect upon the education of the eldest child if the family were to be returned together and also the difficulties set out in the evidence of a relocation to Ukraine.

(v) In relation to the right to an effective appeal again Mr Bassett pointed out the difficulties and hurdles in evidence if the family had to relocate for an appeal relying on R(Byndloss) v Secretary of State for the Home Department [2017] UKSC 42.

[16] Mr Kennedy, on behalf of the respondent, made the following arguments.

(i) In relation to the argument about an in country versus out of country right of appeal, Mr Kennedy said that the Byndloss case dealt with a different situation and was not relevant in this case. As regards Kiarie and Byndloss, the Court of Appeal in Ashan & Ors v SSHD [2017] EWCA Civ 2009 noted that Lord Wilson summarised the decisive issues in Kiarie and Byndloss as being that the appellants would need to give oral evidence and that the evidence showed that the financial and logistical barriers were almost insurmountable. The question of the need for an applicant to give evidence orally, in cases like Kiarie and Byndloss arose in no small part by virtue of the nature of the question to be answered before an appeal; in that case had the appellant truly changed their ways. He said that there had been evidence before the Supreme Court in Kiarie and Byndloss in respect of the obstacles in making effective arrangements for video-link facilities in Kenya and Jamaica. He argued that the Court of Appeal in Ashan accepted in principle that the question of whether it is realistically possible for evidence to be given by video-link needs to be assessed on a case by case basis. Whilst holding in Ashan and the other cases being considered that out of country rights of appeal would not satisfy the appellant's right to a fair and effective procedure, Lord Justice Underhill stated:

> "I emphasise that that conclusion depends on the particular features of the appellant's cases, namely that the nature of the issues raised by their appeals was such that they could not be fairly decided without hearing their oral evidence and also the facilities for giving such evidence by video-link were not realistically available."

In the Ashan and related cases, at issue was the question of whether or not the individual appellants had engaged in cheating and as such their oral evidence was relevant to any consideration of their credibility. The judgment further noted that the question of whether or not there was a requirement for oral evidence will depend upon the nature of the issues.

(ii) Mr Kennedy contended that in the current cases the utility or requirement for oral evidence is not made out and would not be required.

(iii) Mr Kennedy also relied on guidance in relation to the certifying of protection in human rights claims under section 94 guided by the cases of Thangarasa and Yogathas [2002] UKHL 36. The test being that a manifestly unfounded claim is a claim which is so clearly without substance that it is bound to fail; it is possible for a claim to be manifestly unfounded even if it takes more than a cursory look at the evidence to come to a view that there is nothing of substance in it.

(iv) Mr Kennedy argued that the right to family life was not engaged in this case because the family would never be separated. He said that this was effectively a private life case.

(v) In relation to the best interests of the children Mr Kennedy contended that this had been taken into account in the decision-making letter. He referred to the fact that this was a comprehensive letter and that the children would all be returning together to Ukraine and could be accommodated in Ukraine.

(vi) In relation to certification, Mr Kennedy argued that there is nothing in the applicants' circumstances that would allow for a finding that the claim is not clearly unfounded. He said that there were no exceptional circumstances in this case.

(vii) In relation to an effective right of appeal, Mr Kennedy argued that there were not the obstacles contended for by the applicants.

(viii) Mr Kennedy accepted that if the decision in relation to the certification were quashed there would automatically be an in-country right of appeal and so that aspect of the case did not need further consideration.

Consideration

[17] Cases such as this are fact specific however at the outset I recognise a number of overarching principles which are pertinent to this case. Firstly there is the legitimate aim of immigration control. Secondly the best interests of the child must feature in any consideration. This should not be a formulaic exercise. Thirdly section 55(3) makes specific provision that the statutory guidance must be considered. Fourthly, the issue of certification presents a high threshold that such a claim would be "bound to fail". Fifthly, there should not be procedural impediments to an out of country appeal otherwise there is a breach of article 8.

[18] The applicant's main target in this case is the certification as that disentitles the applicants to an in-country appeal against the refusal of their article 8 claim. It is important to note that the standard for certification in any case is high. This elevated standard must be achieved by the decision maker determining that the claim is "one which cannot, on any legitimate view, succeed": Thangarasa and Yogathas v SSHD [2002] UKHL 36 or, "….. whether it is a claim that is so clearly without substance that it is bound to fail": ZT (Kosovo) [2009] UKHL 6.

[19] There are differing types of certification decisions as the Supreme Court case of Kiarie and Byndloss [2017] UKSC 42 illustrates. It was concerned with the certification decision made under section 94B in relation to a foreign criminal. However the effect of any certification is that an appeal can be pursued only from outside the United Kingdom. The Supreme Court held that having regard to the financial, logistical and other barriers, there was no realistic prospect of the effective prosecution and presentation of an appeal from abroad, thereby infringing article 8 ECHR and, in particular, its procedural dimension, and the common law. If the decision maker could not have been satisfied, when making the impugned decisions, that the necessary facilities would be available to the appellants, the decisions were unsustainable in law.

[20] The subsequent decision of Ashan and Others v SSHD [2017] EWCA Civ 2009 also deals with the efficacy of an out of country appeal in a case involving alleged deceit regarding English language tests. The conclusion from that case is that an out of country appeal is not an effective remedy where two conditions are satisfied, namely (a) it would be necessary for the appellant to give oral evidence and (b) facilities to do so by video link from the foreign country concerned are not realistically available.

[21] The applicant's cases do not fall within the Immigration Rules. There is no general obligation to allow couples and their children to an unrestricted choice of residence requiring the admittance of non-nationals for settlement. Much ink was spilt upon an analysis of the rules in the decision-making letter. However, the application for leave to remain clearly falls outside the Rules. Article 8 of the ECHR

requires states to allow individuals to remain in certain circumstances. This involves a consideration of all of the family members involved – see Beoku Betts v SOS for Home Department [2008] UKHL 39. The fact that family life has developed during an individual's stay may then be assessed as part of the proportionality exercise – Nagre v SSHD (2013) EWHC 720, Jeunnesee v Netherlands (2014) Grand Chamber ECtHR.

[22] It is accepted that article 8 is engaged. This is not a separation case and so the issue is the effect of removal upon the private life of the applicants which is encapsulated within article 8. This inevitably involves a consideration of the children as autonomous holders of rights who are also entitled to protection. This case essentially comes down to a question whether the claim is clearly unfounded taking into account the section 55 duty within the 2009 Act to treat the best interests of the children as a primary consideration; see ZH(Tanzania) v SSHD [2011] UKSC 4. If the applicants succeed they are entitled to pursue an appeal while remaining in Northern Ireland. This would nullify the Kiarie and Byndloss point .

[23] Section 55 of the 2009 Act provides:

> "(1) The Secretary of State must make arrangements for ensuring that –
>
> (a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom ….
>
> (2) The functions referred to in sub-section (1) are –
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer …
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)."

[24] In JO & Others (Section 55 duty) Nigeria [2014] UKUT McCloskey J examines this provision in detail. In particular the Upper Tribunal refers to the fact that section 55 "is formulated in terms of an unqualified duty, the genesis

of which is found in Article 3(1) of the UN Convention on the Rights of the Child (`UNCRC', 1989):

> `In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

> "In the field of immigration, therefore, the enactment of section 55 discharges an international law obligation of the UK Government. While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown. The final striking feature of section 55 is that it operates to protect all children who are in the United Kingdom: there is no qualification such as residence or nationality."

[25] At paragraphs 11, 12 and 13 of JO, McCloskey J also refers to the necessity for the decision maker to be properly informed before conducting a "scrupulous analysis". He refers to the mandatory provision of section 55(3) which requires the decision maker to have regard to the statutory guidance which was published in November 2009 and is entitled `Every Child Matters: Change for Children'. At paragraph 13 the following point is also made: "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."

[26] In Re ED (2018) NIQB 19, a recent decision of McCloskey J returns to this issue with particular emphasis upon the statutory guidance - see paragraph [17]. This decision places the wording of the guidance into sharp focus. The decision highlights the fact that the guidance is comprised in a comprehensive document which clearly draws from international and domestic law regarding the best interests of children. This highlights the type of analysis that is required by a decision maker.

[27] The extent of the enquiry was also described by Stephens J at paragraph [92] of ALJ in these terms;

> "The welfare of the children is a much wider enquiry than an enquiry as to whether there is a real risk of a breach of a fundamental right under either the Charter or ECHR. The welfare of the children may be to remain in Northern Ireland even though the applicants are unable

to establish a real risk of a breach of a fundamental right if they were returned to Ireland. "

[28] Section 55 has been considered by the United Kingdom Supreme Court in a number of cases culminating in the seminal case of Zoumbas [2013] UKSC 74 in which Lord Hodge sets out the seven principles which have applied to this best interests consideration 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 the 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 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."

[29] These principles were reiterated by the NI Court of Appeal in AS v Secretary of State [2017] NICA 39 - see paragraph [68] which specifically referred to the fact sensitive nature of any analysis.

[30] A salutary warning as to the potential pitfalls is found in the case of MA (Pakistan) & Ors [2016] 1 WLR 5093. Paragraph [57] of that judgment reads as follows:

> "In my judgment all Lord Hodge JSC was saying is that it is vital for the court to have made a full and careful assessment of the best interests of the child before any balancing exercise can be undertaken. If that is not done there is a danger that those interests will be overridden simply because their full significance has not been appreciated. The court must not treat the other considerations as so powerful as to assume that they must inevitably outweigh the child's best interests whatever that might be, with the result that no proper assessment takes place."

[31] In this case the decision making letter of 20 July 2017 is detailed. However, it must be examined to determine whether or it adequately discharges the aforementioned legal obligations. The decision maker is alive to the section 55 obligation because the letter begins by stating that -

> "This decision also takes into account the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of the children in carrying out her immigration functions."

This is repeated at another stage in the letter at page 6. However to comply with section 55 of the 2009 Act it is not enough to simply refer to the duty.

[32] I now turn to the letter to determine how the best interests of the children have been identified and then balanced against the immigration objectives. Upon close examination of the letter, I am not satisfied that the best interests of the children have been properly identified and assessed for the following reasons:

(i) There is one line on page 6 of 10 which reads, "It is considered that R1 and R2's best interests will be served if they remain with their parents." As Mr Kennedy accepted during the argument there is no further consideration of the specific interests of this children, in particular the issue of the eldest child's schooling which was referenced in the application of 16 November 2016.

(ii) There is no consideration of the fact that English is the first language of the children and the particular resonance of this for the eldest child who is at school.

(iii) Another omission from the letter is any meaningful engagement with the issue of social conditions in Ukraine and how that would impact upon the children.

(iv) At page 7 of 10 some assumptions are made that the applicant's parents could support the children in Ukraine and also that extended family would support them. There is no evidential basis for these statements and in fact the applicant's evidence in these proceedings provides significant contra indicators to this stated position.

(v) There is no reference to the tensions within Ukraine highlighted by the applicant notwithstanding the fact that these have a bearing on the children.

[33] There is also no reference to the statutory guidance in the decision-making letter. That inexorably leads to the conclusion that the decision maker was not aware of this mandatory guidance or did not have regard to it. Either way this omission renders the decision unlawful as it cannot realistically be said (and was not argued) that this failure was immaterial.

[34] Whilst the best interests of the children are acknowledged, the impugned decision does not evidence a proper consideration of the best interests of each child concerned. The consideration of the best interests of the children contains no substance and in my view there has simply been a perfunctory recitation of the section 55 obligation rather than any serious engagement with the issue. The decision articulates the fact that the children can return with their parents to Ukraine and remain a family unit. That is correct, however article 8, comprising as it does the concept of private life, has a much wider compass. In my view the narrow approach adopted in this case offends the foundational basis of a best interests analysis. The decision patently fails to identify the children's best interests, analyse them and balance them against valid immigration concerns. In particular, there is no analysis of the effect upon the children of moving from school (in the case of the eldest child), where English is the first language, to a society, alien to them, beset by internal strife. The decision maker has not assessed these factors through the prism of the section 55 test.

[35] Having viewed this decision carefully, I consider that it is flawed in a number of respects. In short, there has been a clear breach of the separate duties in section 55(1) and section 55(3) of the 2009 Act. This amounts to a finding that the certification cannot be sustained to the high threshold required as it cannot be argued that the case is manifestly unfounded.

[36] My conclusion means that an in-country right of appeal is available. For completeness sake I should say that the comprehensive evidence contained in the applicants' supplementary affidavit persuades me that insofar as there was a legal burden of proof on them they have discharged it to my satisfaction. They have established that they would not have an effective out of country appeal given the

logistical and financial obstacles they have raised. As such I consider that this ground also has merit.

Conclusion

[37] Accordingly the decision must be quashed for the reasons I have given. I will hear from counsel as to the form that relief should take and as to the question of costs.