Neutral Citation No: [2017] NIQB 120 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10501** **JR 2017/109377/01** ***Delivered ex tempore: 11/12/17***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY QIU JU CAI
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

Secretary of State for the Home Department

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MCCLOSKEY J

[1] The Applicant, a Chinese national aged 54 years, seeks the leave of the court to challenge a decision of the proposed Respondent ("SSHD"), dated 8 May 2017, whereby it was determined that her asylum and human rights claim would be certified as clearly unfounded under section 94(1) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002").

[2] In compliance with the court's initial order, a more focused and coherent Order 53 Statement has been compiled. The grounds of challenge are, in brief compass, error of law/misdirection in law; breach of section 55(1) and (3) of the Borders, Citizenship and Immigration Act 2009 ("BCIA 2009"); non-compliance with/breach of the SSHD's published "Certification (etc)" policy; and breach of Article 8 ECHR.

[3] There are differing types of certification decisions under section 94 NIAA 2002. That under challenge in the present case is of the "clearly unfounded" species. The recent decision of the Supreme Court in Kiarie and Byndloss [2017] UKSC 42 was concerned with the different kind of certification decision made under section 94B. Common to both is the consequence 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. Since SSHD 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.

[4] The Court of Appeal has now given judgment in four conjoined appeals of some importance: see Ashan and Others v SSHD [2017] EWCA Civ 2009. Its central conclusion from the perspective of the present case and other analogous cases currently stayed in this court 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: see [72] – [98].

[5] By reason of the decision in Ashan, the Applicants' case clearly overcomes the threshold engaged at this stage and qualifies for the grant of leave on this ground alone. I grant permission to amend to introduce this as an additional ground.

[6] Decisions in "clearly unfounded" certification cases engage the legal test of whether the applicant's claim is "*one which cannot, on any legitimate view, succeed*": Thangarasa and Yogathas v SSHD [2002] UKHL 36 or, alternatively phrased, "….. *whether it is a claim that is so clearly without substance that it is bound to fail*": ZT (Kosovo) [2009] UKHL 6. While the threshold to be overcome by SSHD in order to make a sustainable (ie lawful) "clearly unfounded" certification decision is self-evidently elevated, the threshold for the grant of leave to apply for judicial review for the purpose of challenging such a decision is, correspondingly, a modest one. In cases of this nature, in common with challenges to decisions under paragraph 353 of the Immigration Rules, the court will invariably subject the terms of the SSHD's decision to penetrating scrutiny.

[7] Mr McTaggart (of counsel), on behalf of the Applicant, draws attention to the important distinction between refusal of the asylum/human rights claims (on the one hand) and application of the "clearly unfounded" test (on the other). I accept the submission that having regard particularly to [79] – [82] of the impugned decision it is arguable that these two separate requirements have been conflated. It matters little whether one views this through the lens of error of law (my preferred approach) or non-compliance with SSHD's published policy.

[8] The separate duties enshrined in section 55(1) and (3) BCIA 2009 have been emphasised in, for example, JO Nigeria [2015] UKUT 00517 (IAC). As regards the first, there is no clearly identifiable exercise in the impugned decision of assessing and acknowledging the best interests of the child concerned, the Applicant's granddaughter aged 2½ years. As regards the second duty, there is no indication whatsoever of compliance. The leave threshold is, therefore, overcome on each of these grounds.

[9] The Applicant's Article 8 ECHR challenge is, by some measure, the weakest aspect of her case. However, I decline to refuse leave on this ground given the juridical nexus between section 55 BCIA 2009 and Article 8.

[10] **Delay**. These proceedings have not been initiated promptly. However, two solicitors belonging to the firm representing the Applicant have engaged with the relevant factual issues in admirable detail and, having considered their several affidavits, I am satisfied that a proper basis for extending time has been demonstrated.

Decision

[11] To summarise, leave to apply for judicial review is granted on all grounds, the Applicant is granted permission to provide an amended Order 53 Statement incorporating the additional ground considered in [5] above and the time for bringing these proceedings is extended. Costs are reserved and there will be liberty to apply.

[12] I apprehend that SSHD will wish to reflect carefully on this decision prior to the expenditure of further costs in defending these proceedings. To this end and with a view particularly to ensuring that no further costs incurring steps are taken by either party – bar filing of the Notice of Motion – I shall impose a time limited stay at this juncture, expiring on 12 January 2018. Consistent with this, I decline to programme a timetable for the further conduct of these proceedings at this stage. A joint report to the court by said date is directed.

Footnote

Prior to the leave Order being formalised the Secretary of State agreed to rescind the impugned decision and make a fresh one, thereby bringing the proceedings to a conclusion on 18/12/17.