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| **Neutral Citation No: [2017] NIQB 137**<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **McC10540**<br><br>**JR 2016/040119/1**<br><br>*Delivered: ex tempore:* **12/12/17** |

**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 TL**
**FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**-V-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

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**McCloskey J**

[1] In this judgment I shall describe the Respondent, the Secretary of State for the Home Department, as "SSHD".

[2] The matter under challenge is SSHD's decision dated 05 December 2016 whereby the Applicant's human rights (Article 8 ECHR) claim was dismissed and, invoking paragraph 353 of the Immigration Rules, SSHD further decided that the threshold for a fresh claim had not been overcome. There is also a supplementary, or ancillary, decision dated 12 June 2017. The effect of the impugned decisions is that a challenge by appeal can be mounted only after the Applicant has left the United Kingdom. This is colloquially known as the "depart first appeal later" scenario.

[3] There are three considerations which I would highlight.

[4] The first is section 55(3) of the Borders, Citizenship and Immigration Act 2009. As stated emphatically in JO Nigeria [2014] UKUT 00517 (IAC) this is a free standing duty. It exists independently of the substantive duty in section 55(1). Its purpose is to enhance and inform the best interests assessment which must be carried out under section 55(1). Section 55(3) is framed in imperative ("*must*") terms. See [6], [8] and [12] – [13] in particular of JO (Nigeria).

[5] There is no evidence that SSHD has performed the section 55(3) duty at any stage in this case.

[6] Second, I draw attention to the developing jurisprudence relating to out of country appeals. There are two important decisions, one of the Supreme Court and the other of the English Court of Appeal, in this context. While these decisions were made under different provisions of the immigration laws, they plainly have a bearing in the context of this case since the relevant common denominator is that they concerned decisions which, like that under challenge here, had the consequence that a right of appeal could be pursued only from abroad.

[7] They concerned the differing types of certification decisions under section 94 NIAA 2002, one of which is of the "clearly unfounded" species, a close relative of the "no fresh claim" decision under paragraph 353 of the Immigration Rules (ie. this case). 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 94(b). 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, 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.

[8] 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].

[9] The decision in Ashan and Others was promulgated only days ago. One of its features is that it draws attention to the need for evidence bearing on the discrete question of how the exiled immigrant will, in a given case, conduct and participate in his appeal from abroad. This is clearly a case sensitive question.

[10] The test devised in Kiarie was whether the SSHD, when making the impugned decisions, could have been satisfied that the facilities necessary for the effective pursuit of an out of country appeal would be available to the immigrants concerned. On the state of the evidence before this court, my

provisional view is that SSHD could not have been thus satisfied when making either of the impugned decisions.

[11] Thirdly and finally I draw attention to the impact of the decision in Paposhvili v Belgium [Application number 41738/10]. This is a landmark decision of the Grand Chamber of the ECtHR which significantly dilutes the previously elevated and austere threshold applicable in Article 3 ECHR "medical" cases. The consideration that the publication of this decision post dates the main impugned decision in the present case is of no legal consequence. In passing I note that when the supplementary decision was made some seven months later, there was no appreciation of Paposhvili.

[12] To conclude, the Applicant has an unanswerable case that an order quashing the impugned decisions should be made based on the section 55(3) ground. While his case based on the out of country appeal ground may be of equal merit and strength, it is unnecessary to determine this interesting issue. The Paposhvili ground was not the subject of consideration by the parties' representatives in written or oral argument and, hence, I say nothing further about it.

[13] The outcome is an order under section 21 of the Judicature (NI) Act 1978 remitting the case to SSHD with a direction to reconsider same in accordance with this judgment. I consider this course preferable in furtherance of expedition and clarity and taking into account also the indication that an enlarged case is likely to be made to SSHD.