ALWAYS MIGRANTS – SOMETIMES CHILDREN

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IMMIGRATION, ASYLUM AND CHILDREN: THE CRY OF THE WEAK AND HELPLESS

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Court of Judicature of Northern Ireland

President, United Kingdom Upper Tribunal, Immigration and Asylum Chamber

[1] I trust that I do not self-indulge by beginning with some general reflections which I consider important. There is a host of legal principles, augmented by strong rules of ethics and professional practice, which serve to ensure that the streams of justice are promoted, protected and unpolluted: the system of appointing judges is increasingly rigorous and transparent; there are progressively stronger mechanisms for judicial accountability; the court is independent and impartial; the litigant receives a fair hearing; there are appeal rights to correct any error of law or denial of fair hearing rights; the litigant benefits from high quality professional representation; and the vital end product, namely the judgment of the court or tribunal is, in consequence, both uncontaminated and of high quality. Regrettably, these precious values and standards are increasingly under strain and threat in these islands, particularly in the field of immigration & asylum litigation.

[2] Sadly, refugee crises abound throughout the world today. Where there is conflict, there are invariably innocent victims forced to flee the terror of persecution. While D Day was celebrated just a couple of months ago, little seems to have changed in reality during the 70 years which have elapsed in its wake. Some may be familiar with the work of the German philosopher Hannah Arendt published around seven decades ago, "*We refugees*". This is a remarkable, evocative short essay, written in the dark days of the Second World War. The author describes the fate of refugees as that of human beings who, unprotected by any specific political convention, suffer from the plight of being nothing but human beings. Having been exposed to unspeakable horrors and sufferings, the only clearly identifiable trait common to each of them was their human nature. The author was a refugee from Germany who was interned in a camp in France before seeking asylum in the United States. Later, she expanded the themes of her powerful 1943 essay in her seminal book "The Origins of Totalitarianism". Sadly, the reflections in Hannah Arendt's publications have ample currency and potency in the contemporary world.

[**3**] Today, the refugee crisis described in such gripping terms by Hannah Arendt in the throes of the worst global armed conflict in the history of the world scales unprecedented heights and is arguably just as acute as it was in the dark days of 1943. Politicians are elected to make laws and they do so at both domestic and EU levels. Every law is the product of some form of political compromise. One is prompted to ask whether, in the particular field of asylum and immigration law, there is any glimmer of hope that the hundreds of thousands of exiled and/or stateless human beings in our world have access to stronger and more effective protection than previously? This question applies in a

particularly acute way to children, whether accompanied or abandoned.

[4] When taking stock on the progress which has truly been made since 1944 in developing systems for the efficacious protection of the most vulnerable and threatened peoples of the world, the twin founding instruments of the Council of Europe and the European Union provide an obvious point of departure. These were adopted at a crucial time in history, in the aftermath of a cataclysmic global conflict which had a catastrophic impact on millions of human beings. The Statute of the Council of Europe (adopted in London on 5th May 1949) formulated the aim of this newly established organisation in the following terms:

> "*.... To achieve a greater unity between its members for the purpose of safe guarding and realising the ideals and principles which are their common heritage and facilitating economic and social progress.*

By Article 3, every COE member was required to accept *"the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."* This was followed swiftly by the ECHR (operative from 3rd September 1953), the states signatories whereto resolved as follows:

> "..... *As the governments of European countries which are like minded and have a common heritage of political traditions, ideals, freedom and the rule of law to* ***take the first steps*** *for the collective enforcement of certain of the rights stated in the [UN Universal Declaration of Human Rights, 10th December 1948]*."

[My emphasis]

Pausing momentarily, one recognises from this text the modest aims of the Strasbourg Convention. It was designed as a **first** step in human rights protection in Europe. The States parties also reaffirmed:

> "..... *their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights on which they depend.*"

One can readily identify in the text of the ECHR and the UN Declaration the origins of the Lisbon Charter, which followed some six decades later. And, of course, the Treaty of Rome followed, in 1957.

[5] For the purpose of focusing on the protection of vulnerable children, however, I propose a somewhat earlier starting point. Children did not feature specifically in the most important landmark in the history of international human rights protection, the UN Declaration of Human Rights in 1948. They were, however, recognised implicitly in the opening words of the Preamble –

> "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of* ***all members of the human family*** *is the foundation of freedom, justice and peace in the world.*"
>
> [My emphasis.]

Moreover, the Declaration established a series of fundamental rights and freedoms to be enjoyed by all persons, without distinction "*of any kind*". Notably, the rights of those intending to marry, parents and the family were specifically recognised, in Article 16, paragraph (3) whereof states:

> "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*"

Children were, therefore, clearly in the frame.

[6] It is sometimes overlooked, however, that special recognition of the rights of children at international level was already in existence. On 26th September 1924, the Geneva Declaration of the Rights of the Child was promulgated. This was the work of the League of Nations. It is a short, but remarkable, document, which proclaimed, inter alia:

> "*By the present Declaration ……. Men and women of all nations, recognising that mankind owes to the Child the best that it has to give, declare and accept as their duty that, beyond and above all considerations of race, nationality or creed ……*"

There followed a short menu, consisting of just five paragraphs. I draw attention to the second of these:

> "*The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured.*"

It is no irreverence to describe this as an international law Sermon on the Mount. Its flavour is unsurprising, given the influence of the

Judeo- Christian traditions in the development of both international law and the common law.

[7] The 1926 Declaration is of note for another reason. In the present era there is, quite properly, a heavy emphasis on the notions of duty and balance. The asserted rights and freedoms of the individual are frequently debated and calibrated against this background. Intriguingly, this concept was expressly articulated in paragraph 5 of the 1924 Geneva Declaration:

> "*The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.*"

The vision and enlightenment which precipitated the Geneva Declaration should serve as a continuing source of inspiration. I suggest that, almost one century later, one can learn much from this compact, but fascinating, instrument.

[8] In the wake of the Universal Declaration of Human Rights (1948), the UN Declaration of the Rights of the Child followed, in 1959. At the heart of this instrument lay the following acknowledgement:

> "*Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.*"

The 1959 Declaration reiterated that:

> "***Mankind owes to the child the best it has to give***."

This was an exact replica of the Geneva Declaration three decades previously. These simple words established an obligation of undeniable gravity. The purpose of this Declaration was framed in unequivocal language:

> "*……. to the end that* [the child] *may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth …….*"

Herein, one can readily identify a notable evolution in the international regime for the protection of children. Furthermore, the concept of reciprocal responsibility, expressed in paragraph 5 of the 1924 Declaration, was repeated. There followed a comparatively modest list of rights – the right to a name, a nationality, free elementary education and so forth.

[9] Fully 30 years were to pass until a comprehensive international charter of childrens' rights made its appearance, in the form of the UN Convention on the Rights of the Child (1989). This has achieved a remarkably high rate of ratification. However, almost 25 years later, it might be said that, in the domestic legal system of the United Kingdom, this measure has not attained its full potential, as it belongs to the domain of international law and is, therefore, embraced by the longstanding principle that international treaties and conventions are not self-executing, attributable to the so-called "dualist" dogma. Notwithstanding, during this period, the impact and importance of the Convention have been judicially recognised. This is best illustrated in the words of one senior English judge who said, in 2002, that the UNCRC (and the European Charter) -

> "*can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations……"*

[Per Munby J in ***R (Howard League for Penal Reform) – v – Secretary of State for the Home Department*** [2002] EWHC 2497 Admin, paragraph 51.]

[10] Accession by the United Kingdom to UNCRC did not, by reason of the aforementioned doctrine, give effect to the provisions of the Convention in domestic law. However, there have been significant advances in the municipal laws of the United Kingdom in the protection of childrens' rights. For today's purposes, I propose to focus attention on section 55 of the Borders, Citizenship and Immigration Act 2009 ("*the 2009 Act*").

[**11**] Article 22 of UNCRC require the provision of "*appropriate protection and humanitarian assistance*" to children either seeking refugee status or considered to be a refugee. It imposes a related duty on states parties to co-operate in the work of UN and other organisations "*…. to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family ….*"

Upon ratifying UNCRC on 16 December 1991, the UK entered a reservation in respect of Article 22 in the following terms:

> "*The United Kingdom reserves the right to apply such legislation, insofar as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom and to the acquisition and*

possession of citizenship, as it may deem necessary from time to time."

The professed justification for this reservation, which was much criticised then and subsequently, was the preservation of the integrity of the UK's immigration laws. Eventually, on 04 December 2008, the reservation was withdrawn. This was followed by the enactment of section 55 of the 2009 Act.

[12] Section 55 of the Borders, Citizenship and Immigration Act 2009 ("*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 ….

[this is the umbrella, administrative duty]

(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).*

The latter is the crucial, case-by-case duty to be discharged by decision makers and caseworkers. The attention of the keen legal eye is quickly drawn to two words, namely "*arrangements*" and "*guidance*". The third stand out word, which is repeated, is "*must*".

[13] The genesis of section 55 is found in a provision of international law, 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 (*infra*) have shown.

[14] Section 55 of the 2009 Act and Article 3(1) of UNCRC are to be contrasted with section 1(1) of the Children Act 1989, which provides:

"*When a court determines any question with respect to –*

(a) The upbringing of a child; or

(b) The administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

The terms of section 55 are demonstrably weaker. There is no mention of the best interests of children and no "paramouncy" provision. Rather, in language which has become more than familiar to public law practitioners, the specified factor – "*the need to safeguard and promote the welfare of children who are in the United Kingdom*" – is a consideration to be taken into account by the relevant decision maker.

[15] Enter Article 8 ECHR, which provides:

"*(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Two decisions of the Supreme Court have pronounced upon two matters in particular –

(a) The question of the hierarchical ranking of the section 55(1) factor with other material factors.

(b) The interaction between section 55 and Article 8 ECHR.

[16] While Article 8 ECHR and section 55 of the 2009 Act have separate juridical identities, they are clearly associated. Thus where the Article 8 family life equation involves children, section 55 is immediately engaged. In ZH (Tanzania) [2011] UKSC4, Baroness Hale emphasised that the best interests of the child must be considered first – see paragraph [26] – while Lord Kerr stated:

> "*[46]…….. A primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.*"

[Emphasis added]

As was recognised in Mansoor – v – Secretary of State for the Home Department [2011] EWHC 832 (Admin), the onward march of the Strasbourg jurisprudence has involved the progressive development of the best interests of the child principle under Article 8.

[17] In ZH**,** Baroness Hale opined that Article 8 ECHR must be interpreted in such a way that the best interests of relevant children are a primary consideration, while recognising that they may not necessarily be the paramount consideration: [33]. Thus the rights of other, adult family members may be accorded lesser importance. With strong echoes of the 1924 Geneva Declaration, she adverted to the "*strong public interest in ensuring that children are properly brought up*". Notably, echoing Lord Hope in the Norris case, she emphasised that there is "*no substitute for* [a] *careful examination …….* [of all the circumstances]" [34]. Thus:

> "[82]*…. **The Court** will need to know whether there are dependent children, whether the parent's removal will be harmful to their interests and what steps can be taken to mitigate this. …. In the more usual case, where the person whose extradition* [or removal or deportation] *is sought is not the sole or primary carer for the children, **the Court** will have to consider whether there are any special features requiring further investigation of the children's interests, but in most cases it should be able to proceed with what it has.*"

[My emphasis]

This passage throws up the intriguing question of the procedural content of this vital duty, which I wish to explore presently.

[18] This was one of the issues which featured in SS (Nigeria) – v – SOSHD [2013] EWCA Civ 550, which concerned the statutory regime governing the deportation from the United Kingdom of foreign criminals. Notably, the Guidance issued under section 55(3) of the 2009 Act – "**Every Child Matters: Change for Children**" (November 2009) – was ventilated in argument: [33], but evidently received little weight or attention. It was argued that section 55(1), in tandem with the Guidance, requires a proper investigation of the child's best interests, with the Court or Tribunal sufficiently armed as a result. Laws LJ stated that "*..... in very general terms I would not quarrel with this proposition ...*": [35]. His Lordship, having equated "*a primary consideration*" with "*a consideration of substantial importance*" – [44] – reaffirmed that in cases involving children –

> "[55] *... The interests of a child affected by a removal decision are a matter of substantial importance and .... the Court must proceed on a proper understanding of the facts which illuminate those interests ...*"

But, procedurally, what does this require, particularly of the primary decision maker?

[19] More detailed prescription of the correct approach to section 55 and its interaction with Article 8 ECHR has followed. In Zoumbas – v – Secretary of State for the Home Department [2013] 1 WLR 3690, the Supreme Court recently considered the interplay between the best interests of the child and Article 8 ECHR, rehearsing what might be termed a code devised by Lord Hodge comprising seven principles:

(1) The best interests of a child are an integral part of the proportionality assessment under Article 8 ECHR;

(2) In making that assessment, the best interests of a 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 the 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; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

As Lord Hodge observed, the genesis of these principles is found in the United Nations Convention on the Rights of the Child 1989, particularly Article 3(1) which, in turn, influences the interpretation of Article 8 ECHR.

[20] Elaborating on the seven principles set out above, Lord Hodge formulated three qualifications:

> "*[13] We would seek to add to the seven principles the following comments. First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159, per Lord Bingham at para 12. Secondly, as Lord Mance pointed out in H(H) (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of H(H) shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children.*"

Lord Hodge continued:

> "*The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in H(H) (at*

para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents."

[My emphasis]

One of the obvious merits of the opinion of Lord Hodge in Zoumbas is that it consolidates in a single, accessible source one set of the principles which must be applied in cases of this nature.

[21] Thus there are decisions of the highest authority to the effect that one of the requirements of section 55 is that the primary decision maker (SOSHD) must be sufficiently alert to all relevant facts and circumstances in order to make a properly informed assessment of the best interests of the child or children concerned in deciding what is proportionate in the particular context. It would appear that, as a minimum, this duty entails giving conscientious consideration to all available information. In most cases, the source/provider of most of the relevant information is the claimant, with or without the benefit of legal assistance. In the majority of cases, SOSHD will have independent access to information bearing on the immigration history of the persons concerned. The extent, if any, to which SOSHD must be proactive in investigatory/information gathering exercises in the decision making process has not yet been authoritatively decided. It is not difficult to predict that this issue will arise sooner rather than later.

[22] Two particular features of section 55 are worthy of careful note. The first is that the duty imposed on the Secretary of State relates to children "*who are in the United Kingdom*". It will be noted that there is no nationality or citizenship qualification. The second is the duty imposed on officials to "*have regard to any guidance given …. by the Secretary of State for the purpose of subsection (1)*" . As noted above, this aspect of section 55 flickered only briefly in the case of SS. The guidance (available on the UKBA website) was duly published in November 2009. It is entitled "Every Child Matters: Change for Children". Notably, at paragraph 2.7 it contains a series of "*principles*" which are rehearsed in the context of a statement that UKBA "*must ….. act according to …….*" same. Three of these principles are worthy of note:

- Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.

- Children should be consulted and the wishes and feelings of children taken into account whenever practicable when decisions affecting them are made.

- Children should have their applications dealt with in a timely way which minimises uncertainty.

Do we find any clues here to the procedural reach and content of the section 55 duty?

[23] Delegates should also be aware of some lesser noticed first instance decisions in which the section 55(3) Guidance has featured. The first is R (TS) – v – SOSHD and Northamptonshire CC [2010] EWHC 2614 (Admin). Wyn Williams J emphasised, at [24], that –

> "*….. The terms of the written decision must be such that it is clear that the substance of the duty was discharged.*"

One wonders, in passing, how many UKBA decision letters pass muster in this respect. His Lordship further opined that certain provisions of the UN Convention (Articles 20 and 24) (which concern the special duty owed to unaccompanied/abandoned children and a child's right to health care and services) "*…. will obviously be important components when the best interests of the child are being considered*": [32]. Turning to the Guidance issued under section 55(3), he suggested that there is a duty on the officials concerned to take this into account. This means that slavish adherence is not required: however, any departure requires the articulation of clear reasons: [32] – [34]. Noting the language in which the Guidance is couched, his Lordship considered that –

> "[35] *……. When a decision maker is having regard to the need to safe guard and promote the welfare of a child he is for all practical purposes also having regard to the best interests of the child.*"

Where a decision proposes a course or measure which does not safeguard and promote the welfare of a child, "*cogent reasons*" are required.

[24] Article 24 of the Lisbon Charter (viz the EU Charter of Fundamental Rights), with its accompanying "Explanation", arguably gives some sustenance to this approach. The decision in TS may properly be described as progressive. The influence of public law principles, in particular in the proposition that any departure from the statutory guidance requires the articulation of clear and cogent reasons, is at once apparent. Of equal interest is the Court's preparedness to explore provisions of UNCRC other than Article 3 in an endeavour to identify the touchstones by reference to which a child's best interests are to be assessed. This is an approach which will appeal to many, not least because it gives effect to a well recognised general principle that one must not consider a provision of any legal instrument in isolation from its surrounding context.

[25] Approached in this way, there may be some scope for arguing that while only Article 3 of UNCRC has been given domestic effect (via section 55), other provisions of the Convention may have a status akin to indirect effect. These include, intriguingly:

- A child's right to express its views and to freedom of expression (Articles 12 and 13).
- A child's right to freedom of thought, conscience and religion (Article 14).
- A child's right to freedom of association and freedom of peaceful assembly (Article 15).
- A child's right to protection against "*unlawful attacks on his or her honour and reputation*" (Article 16).
- The right of a mentally or physically disabled child to "*a full and decent life*" (Article 23).
- Every child's right to the enjoyment of "*the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health*" (Article 24).
- Every child's right to "*a standard of living adequate for the child's physical, mental, spiritual, moral and social development"* (Article 27).
- A child's right to education (Articles 28 and 29).
- The right of every child to "*rest and leisure*" (Article 31).
- Every child's right to be protected against economic exploitation, the elicit use of narcotic drugs, abduction and all other forms of exploitation (Articles 32 – 36).

Furthermore, the menu of rights enshrined in UNCRC is notably wider than those given effect by the Human Rights Act (and, indeed, the Lisbon Charter) and, while some are, to a greater or lesser extent, replicated in certain measures of domestic law, others are strikingly novel.

[26] Judicial recognition, in at least embryonic form, that the duty contained in section 55 may have a proactive / procedural dimension can arguably be found, reasoning by analogy, in T (Entry Clearance) Jamaica [2011] UKUT 00483 (IAC). This case concerned a child living

abroad. The Upper Tribunal decided that section 55 did not apply to the child in question because she was outside the United Kingdom. However, the Tribunal held that as a pre-requisite to a lawful decision, Entry Clearance Officers may, in certain circumstances, have to undertake enquiries, resolve disputed issues of fact and, possibly, conduct interviews: see [34] – [37]. True it is that the Upper Tribunal did not hang this discrete holding on any specific public law peg. However, it is not difficult to identify the genesis as the duty to take into account all material considerations – which, of course, is in essence a duty to be properly informed – and its near relative, namely the duty of enquiry. The Padfield principle looms large: there is a duty on every deciding public authority to ask itself the correct question. If the Tribunal had decided that section 55 did apply, would this have stimulated a conclusion that these duties did not arise? This seems unlikely.

[27] It is also noteworthy that in a first instance unreported decision of the Administrative Court, Tinizaray – v - SOSHD [2011] EWHC 1850 (Admin), a Deputy Judge of the High Court distilled from the opinion of Baroness Hale in ZH (Tanzania) the proposition that:

> "*… it is essential to obtain all the necessary information about the child in other ways before the decision is taken. To do this, the right questions must be asked of the child and others to obtain a full and fair understanding of the child's situation and views. This might include information obtained from the Child and Family Court Advisory and Support Service or the local Childrens' Services Authority, if those services can be persuaded to help … It is essential that the right questions must be asked by the decision maker and answered by the child and on behalf of the child at the right time in the decision making process.*"

See [15].

[28] Most recently, the duty enshrined in and the Guidance issued under section 55 were considered by Deputy Judge Grubb in R (Behary) – v – SOSHD [2013] EWHC 3575 (Admin). The judgment draws attention to the truism that section 55 imposes a public law duty which arises to be performed irrespective of whether Article 8 ECHR forms part of the framework: [35]. Furthermore, the duty must be discharged irrespective of whether a particular decision falls within or outwith the ambit of the Immigration Rules: [37]. The Court, at least by implication, favoured a construction of section 55 which does not impose any proactive duty of enquiry or investigation on the Secretary of State, placing some emphasis on the fact that when the applications in question were made the Claimant was not relying upon her child's interests as the basis upon which she should be granted leave to

remain in the United Kingdom: [39] – [43]. The Judge expressed his conclusion in the following terms:

> "[46] *…. It cannot, in my judgment, have been Parliament's intention to impose upon the Secretary of State a duty to consider the best interests of a child where those interests are not expressly or by implication relied upon or raised by an application to remain in the UK.*"

This, of course, leaves open the question of the content and extent of the duty in a case where **some** information, inadequate and incomplete, is provided. Are children really at the mercy of the efficiency and alertness of their parents or carers and legal representatives? Or does section 55 confer on them more extensive and efficacious protection? These are some of the questions which the section 55 jurisprudence, in its current state of evolution, leaves unanswered. In the abstract, it would be at least mildly surprising if the section 55 duty does not have some procedural content in certain contexts.

[29] Another recent illustration of section 55 flickering rather than shinning is provided by R (Baradaran) – v – SOSHD and Another [2014] EWCA Civ 854, which concerned a challenge to the Secretary of State's decision to refuse the Appellant's asylum claims and to remove them to France. The challenge was based on the Appellant's objections to the outlawing in France of the wearing of the Burka and Niqab in public, which was said to infringe their ECHR rights. One of the grounds of challenge was that the impugned decision was in contravention of section 55. Notably, in reviewing the Secretary of State's decision letter, the Court of Appeal considered that the decision maker was entitled to assume that the "best interests facts/factors" had been laid out in the written representations of the Appellant's solicitors: see [35] and [39] – a discrete, but important, statement which may have to be revisited in some appropriate future case. The Court's conclusion on the substantive issue is also noteworthy:

> "*…. The weighing of the best interests of M conducted by the Secretary of State in the letters … is unimpeachable. …*
>
> *She has recognised the importance of M's best interests and given cogent reasons for concluding that they do not point against removal to France. She has also weighed in the balance (as she is entitled to do) the need to maintain an effective immigration control and an efficient implementation of the Dublin II Regulation.*"

The key to this conclusion was obviously a high quality letter of decision – thought by some to be a rapidly vanishing species, to the point of being positively endangered!

[30] As regards both the ambit of the duty created by section 55(1) and the related duty under section 55(3) there is, therefore, some relatively unexplored and unexploited territory. There are some indications, however, that this is changing. Practitioners seem to be awakening slowly to the potential for successful judicial review challenges which subsection (3) contains. The word "*must*" suggests, uncontroversially, a **duty** on the part of decision makers to have regard to the relevant guidance in making immigration decisions affecting children, whether directly or indirectly. The duty is expressed in familiar terms: the officials must "*have regard to*" the relevant guidance. Recently, I have experience in immigration judicial reviews and appeals involving children of large numbers of decision letters the terms whereof call into question whether this duty is being routinely performed. Potentially, the grounds of challenge include:

- A failure to have regard to the guidance.
- Taking the guidance into account but not giving it proper effect.
- Misinterpreting or misunderstanding the guidance.
- Paying mere lip service to it,
- Departing from the guidance without providing adequate reasons for doing so.

These are all well recognised public law misdemeanours.

[31] At this juncture, in the interests of developing the debate, it seems appropriate to recall one particular aspect of the Human Rights Act jurisprudence of the House of Lords. In R (Begum) – v – Denbigh High School [2006] UKHL 15, which concerned a school's policy restricting the attire of its pupils. The Court of Appeal held that the Appellant's rights under Article 9 ECHR had been infringed on account of the **process** whereby the school had made the impugned decision viz to exclude the pupil from the school. In the words of Lord Hoffmann, the school had infringed the pupil's Article 9 rights "*….. because it had not reached its decision by an appropriate process of reasoning*": [66]. The error in this approach was highlighted most cogently by Lord Bingham:

> "[29] *…… But the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision making process, but on whether, in the*

case under consideration, the applicant's Convention rights have been violated ….. the House has been referred to no case in which the Strasbourg Court has found a violation of a Convention Right on the strength of failure by a national authority to follow the sort of reasoning process laid down by the Court of Appeal …

[31] ……. ***but what matters in any case is the practical outcome, not the quality of the decision making process that led to it.***"

[My emphasis]

See also per Lord Hoffmann who, in [68], contrasted the typical domestic judicial review challenge in which the Court is frequently concerned with whether the decision maker reached the impugned decision "*in the right way*" with the correct approach in Convention Rights cases, where the focus is on outcome, rather than process.

[32] To like effect is the decision in Belfast City Council – v – Miss Behavin' Limited [2007] UKHL 19, where the Northern Ireland Court of Appeal held that the Town Council's decision declining to exercise its statutory power to license a sex shop was unlawful on the ground that the authority, in so deciding, had displayed no awareness of the applicant's Convention rights, particularly those protected by Article 10 and Article 1 of Protocol Number 1. In line with the Denbigh High School case, their Lordships roundly disapproved this approach: see per Lord Hoffmann, [13].

[33] I mention these decisions because, having regard to the later jurisprudence of the Supreme Court concerning section 55, there appears to be a detectible shift. In cases involving children, where, as a matter of practice, Article 8 ECHR almost invariably arises, the **process** whereby the ultimate decision is reached seems to have assumed unmistakeable importance. Both the Supreme Court and the Court of Appeal have recognised that in order to discharge the section 55 duty the relevant facts and circumstances must be known to and properly considered by the decision maker. In Zoumbas (*supra*), the language is unequivocal:

"[10] ***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.***"

Since the duty created by section 55 is imposed on SOSHD, this stricture must, sensibly, be directed to that agency. And there is a further dimension: since the effect of the House of Lords jurisprudence is that in Convention cases, the Court is the ultimate arbiter of

proportionality, this ordinance also appears to be directed to the relevant reviewing or appellate court or tribunal. The full juridical effects of the interlocking of section 55 and Article 8 ECHR have not yet been comprehensively expounded in the jurisprudence

[34] Finally, reverting to the central theme of this paper, I draw attention to two noteworthy recent decisions of the English Court of Appeal which demonstrate that the process of discovering the full impact and extent of the section 55 duty is a continuing one.

[35] R (SQ Pakistan) – v – Upper Tribunal [2013] EWCA Civ 1251 is the latest in a long line of cases concerning what is sometimes described, inelegantly, as "health tourism". These are challenging cases because they frequently contain compelling humanitarian and compassionate elements. However, following the Strasbourg jurisprudence, the superior courts in the United Kingdom have set a high threshold for success. This is reflected in **SQ**. The leading decisions are D – v – United Kingdom [Application number 30240/96], N – v – SOSHD [2005] 2 AC 296 and N – v – United Kingdom [2008] 25 BHRC 258. In this group of cases, the persons concerned were adults who had entered the United Kingdom unlawfully. In SQ, the distinction argued was that it concerned a child whose presence in the United Kingdom had at all times been lawful. Section 55 of the 2009 Act also featured. The clearest articulation of the governing principles is found in the judgment of the ECTHR in N:

> "[42] *Aliens who are subject to expulsion cannot in principle claim entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling state. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting state, is not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting state may raise an issue under Article 3, but only in* ***a very exceptional case****, where the humanitarian grounds against the removal are compelling.*"
>
> [Emphasis added.]

[36] In SQ, the child, now aged 16 years, suffered from a very serious medical condition (Beta Thalassaemia) for which he had been receiving health care in the United Kingdom of a quality significantly better than

that available to him in his home country, Pakistan, bringing about much improvement in his health and well being. His application for indefinite leave to remain was refused by the Secretary of State, a decision which was upheld on appeal to the First-tier Tribunal. Ultimately, he was successful before the Court of Appeal. This decision is notable because the Appellant's case was based on Article 8 (not Article 3), in conjunction with section 55. The Court concluded that the FtT had erred in law in deciding that removal from the United Kingdom would not interfere with the Appellant's right to respect for private life. This was considered unsustainable, in circumstances where the real issue was proportionality. An Order was made remitting the case to the Upper Tribunal. There is a procedural aspect of this case which is noteworthy. The FtT having dismissed the Appellant's appeal, the Upper Tribunal refused permission to appeal. This was challenged by an application for judicial review in the Administrative Court, where permission was refused on the papers, followed by a grant of permission by a Judge of the Court of Appeal. The Order of the Court of Appeal was to grant permission to apply for judicial review, to deal with the application substantively, to allow it and to remit the case to the Upper Tribunal on the basis that it is "*the expert tribunal for the carrying out of a proportionality assessment such as is now required*": [25].

[37] Within recent weeks, the same panel of the Court of Appeal allowed the appeal of a six year old Algerian girl who has been lawfully present with her mother in the United Kingdom since 2009 : AE (Algeria) – v – SOSHD [2014] EWCA Civ 653. A visa had been granted specifically to enable her to receive medical care at Great Ormond Street Hospital for her severe disabilities arising out of the congenital disease of Spina Bifida. The Court of Appeal allowed the appeal under Article 8 ECHR, quashed the decision of the Upper Tribunal and remitted the case for reconsideration. Notably, the twin ingredients of the successful appeal were, once again, Article 8 in tandem with section 55, a reflection of the growing influence of the latter. In holding that the Upper Tribunal had erred in law, the Court of Appeal said the following:

> "[9] *What was required was a structured approach with the best interests of* [the child] *and her siblings as a primary consideration but with careful consideration also of factors pointing the other way. Such factors include, but are not limited to, the overstaying of the children and their mother and the illegal entry and bogus asylum claim of the Appellant's father.*"

Maurice Kay LJ added:

> "*…. I do not consider that it would be inappropriate for the future cost and duration of* [the child's] *treatment and care in*

this country to play a part in the balancing exercise as matters relating to the economic well being of this country, given the strains on the public finances."

Again, the appeal succeeded under Article 8 ECHR only**,** twinned with and fortified by section 55.

Conclusion

[38] Thus there are some indications (or rumblings) that new life is being breathed into section 55 and the statutory guidance made thereunder. It seems to me that these provide, in tandem, two potentially fertile sources of challenge and argument for the enterprising lawyer in cases involving children. The final chapter in this sphere has surely not been written.