Neutral Citation No: [2020] NIQB 10 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11170** *Delivered: 5/2/20*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR93

_____

KEEGAN J

Introduction

[1] This application for judicial review is dated 21 October 2019. It is a review of decisions of the Secretary of State for Home Department ("SSHD"). The applicant has been afforded anonymity due to his connection with a child who is referenced in these proceedings.

[2] The applicant is a Romanian national. He has been detained at Brooke House Immigration Centre and subsequently Harmondsworth Immigration Centre since 8 October 2019 pending a decision on his removal from this jurisdiction. Removal directions were provided to the applicant on 23 September 2019. The applicant's detention follows his release from a 16 month custodial sentence imposed upon him for theft and burglary which he served at Hydebank Young Offenders Centre. The applicant was released from that sentence on 8 October 2019 but detained as a result of the decision of the SSHD which is under challenge.

[3] The applicant seeks an order of certiorari to quash the decision to detain him, a declaration that the impugned decision was irrational and unlawful and an order of mandamus requiring release. The applicant also sought interim relief in the form of bail and applied for expedition in this case. The case was heard on 24 October 2019. The case then had to be adjourned for evidence to be regularised and subsequently it was heard again on 4 November 2019, and 6, 17 and 18 December 2019. Given the issues that arose in the case it proceeded as a rolled up hearing by agreement. Ms Fionnuala Connolly BL appeared on behalf of the applicant and Mr Joseph Kennedy BL on behalf of the respondent. I am grateful to counsel for their helpful written and oral arguments.

[4] The challenge contained within the Order 53 statement is unequivocally directed at the detention (not at the removal decision itself) on the basis that it is unlawful for a number of reasons namely:

(i) That it is in breach of Article 5(2) of the European Convention on Human Rights ("ECHR").

(ii) That it is in breach of Article 8 of the ECHR and Section 55 of the Border Citizenship and Immigration Act 2009.

(iii) That it is in breach of policy regarding the use of detention specifically Chapter 55 of the Enforcement Instructions Manual on Detention.

(iv) That it is in breach of EU law.

(v) That the decision-maker failed to take into account a number of relevant matters in reaching the decision particularly that the applicant asserted that he was an EU citizen, had resided in Northern Ireland since 2010, had a family home here and a child.

[5] Some context to this case is gleaned from other related proceedings namely care order proceedings in relation to a child which I will refer to and immigration proceedings which pre-dated the detention. A helpful general chronology has been provided by counsel as follows:

Approx. 2010	Applicant entered the United Kingdom with his family (parents, brother, 3 sisters). Applicant has resided at an address in Belfast since 2010.
2018	Applicant's daughter born.
26 November 2018	Applicant convicted of theft and burglary and sentenced to 16 months imprisonment at the Young Offenders Centre. Applicant appealed the sentence and was granted bail.
11 December 2018	Applicant arrested on foot of a European Arrest Warrant and detained at Young Offenders Centre.
7 May 2019	Social Services attended with applicant at Young Offenders Centre and asked that he put forward family names willing to act as kinship placements until he was released from prison. Applicant put forward his mother and sister.

9 May 2019	Applicant's solicitor lodged representations to the Home Secretary.
9 July 2019	Interim care order granted by Belfast Family Care Centre in respect of the child.
24 September 2019	Applicant served with decision to make a deportation order. Letter addressed to applicant care of the Governor of the Young Offenders Centre that his representations had been refused.
27 September 2019	Applicant lodged an appeal against the deportation decision. Solicitor makes representations to the Home Office including his family circumstances and requests review of deportation decision.
2 October 2019	Detention order made in respect of the applicant and correspondence sent to the Young Offenders Centre.
3 October 2019	The applicant's former solicitors were made aware by a member of staff at Hydebank of detention documentation in respect of the applicant and that he would not be released on 8 October 2019 and that he would be held at Hydebank until further notice.
4 October 2019	Confirmation of conveyance received from the Young Offenders Centre.
4/5 October 2019	The Sentencing Manager, attempted to serve paperwork on the applicant. Applicant stated that he would not sign for this documentation. There is disputed evidence in relation to the reasons for this.
7 October 2019	The current solicitors are instructed on behalf of the applicant.
8 October 2019	The applicant was released from custody at the Young Offenders Centre and transferred into immigration detention. The applicant was removed from the Young Offenders Centre to Brooke House.
8 October 2019	The applicant's solicitors applied for Secretary of State bail. No decision made on this application.

9 October 2019	The applicant's solicitors wrote to the First Tier Tribunal advising that the client had been detained at Brooke House. A date was sought for the bail hearing.
11 October 2019	A bail application was lodged with the First Tier Tribunal. The hearing was listed at Taylor House.
16 October 2019	The applicant consulted with his solicitor at Brooke House and provided an approved statement. The applicant's solicitor wrote to the Tribunal Service seeking transfer of bail hearing to Laganside. That application was refused.
29 October 2019	A bail application took place before the First Tier Tribunal Immigration Judge Rea. Bail was refused and reasons were provided.
1 October 2019	A letter from the Young Offenders Centre set out the applicant's record whilst in prison which contained a favourable report.
21 October 2019	His Honour Judge Kinney at the Family Care Centre granted permission for the release of a schedule of documents to the court.
28 November 2019	The final care hearing for the relevant child was adjourned by the Family Care Centre.
28 November 2019	The deportation appeal listed for hearing before the First Tier Tribunal was upon application by the applicant adjourned to 7 January 2019 to a venue in London. Application for a different date at Belfast requested.
23 December 2019	A second bail application was heard and refused by Immigration Judge Gillespie.

Further relevant information

Upon enquiry by the court, I was informed on 22 January 2020 that the applicant had withdrawn the appeal against deportation which was listed on 7 January 2020 and that the solicitors had come off record in relation to that. The court was also informed that the removal directions are set for 6 February 2020.

> On 3rd February 2020 I was informed that removal directions had been brought forward to 30 January 2020 as the applicant had been disruptive in detention.

The evidence of the applicant

[6] The applicant's solicitor has generated a number of affidavits in this case which I have considered. These set out the background to the case. The applicant has also filed an affidavit of 21 November 2019 which sets out his evidence in this case which is obviously of some significance and which I summarise as follows. In his affidavit the applicant refers to his detention since 8 October 2019. He states that "this means that I cannot have any contact with my daughter and I can't participate effectively in the care proceedings case." He said he has been advised that usually a person can ask to be assessed as a suitable parent. He refers to his partner who he says he has known for around five years and has been in an in/off relationship for the past three years. He does say that the relationship was volatile and he makes a claim that his partner often had sudden outbursts of aggression towards him. He says in his affidavit that he was present at hospital when his daughter was born. He says he had contact with her on that first day after the birth. He says he changed the baby's nappy on that day and he had about an hour of contact. He said that he returned to hospital on the second day and brought clothes and nappies. He says on the second day his partner informed him that he was not the father of the child and that she had gone back to prostitution during mid-2018 and she believed she had fallen pregnant during that time.

[7] The applicant states in his affidavit that he was in total dismay and shell-shocked at the thought that his daughter was not his daughter so he attended the hospital and had an argument with the applicant as a result of which he was advised by a doctor at the hospital that he was not permitted to have contact with his daughter due to his behaviour. This was supported by Social Services. The applicant confirms that he has not had any other contact with his daughter. He then refers to the fact that he requested paternity testing. In relation to his criminal history, the applicant confirms that on 26 November 2018 he received a 16 month custodial sentence and his solicitor advised him to appeal. He says he was granted bail and his first appeal hearing date was 7 December 2018. The applicant explains that in December 2018 "my grandmother died and I returned to Romania for her funeral. My grandfather was still living in Romania and I stayed with him but convinced my grandfather to return to Northern Ireland with me in January 2019. We returned to Northern Ireland together. When I returned to Northern Ireland, I was unaware that the courts had issued a European Arrest Warrant for me."

[8] The applicant then confirms that he was arrested on 11 February 2019 and detained at Hydebank Young Offenders Centre. He states at paragraph 20 of his affidavit that he has spent eight months within the Young Offenders Centre and has had time to reflect upon his "out of control behaviour". He states that "I am extremely sorry for my offending behaviour and the shame that I have caused my

family". He avers in paragraph 23 that he has listened to his family and during his detention he has undertook English speaking and other language courses and he has performed a car valeting course. He has also been encouraged to attend Barnardo's parenting course. The applicant therefore maintains that he has used his time constructively in the Young Offenders Centre.

[9] The applicant then refers to some contact in May 2019 with Social Services and he confirms that on 15 July 2019 paternity results came back to say that he was the father of the child. At paragraph 28 of the affidavit the applicant states:

> "I understand that this honourable court will not consider the lawfulness of the deportation decision but rather only the detention decision. I wish to advise the honourable court that I fully intend to oppose my deportation before the Immigration Tribunal. I just want to get a job and look after my daughter. I am fully committed to this process and now understand the importance as my daughter depends upon me as a responsible adult and I don't want to get into more trouble with the police."

He then says that he has instructed his solicitors to proactively take his representation forward in the care proceedings.

[10] The applicant continues by describing his family life in Belfast which he says has been established since 2010 with a large supportive family network. He states that he is concerned about the continued separation from his family and about the fact that he cannot participate properly in the care proceedings for his daughter.

[11] A supportive affidavit has also been filed by the applicant's mother which is dated 20 November 2019.

[12] The third affidavit of Mr Swift confirms that on 18 November 2019 he lodged a C2 application on behalf of the applicant for an order for parental responsibility, an order for contact and an order for residence. Previously no application had been lodged before the court. I have also received some of the family papers from the Family Care Centre which set out the Social Services involvement with the applicant. In that regard it is significant to note that the family papers present the full history in relation to the applicant's involvement which was not immediately apparent from the original papers in this judicial review. Page 18 of the initial social work report in 2018 refers to the applicant in the following terms:

> "Essentially the Trust has made efforts to engage the applicant in the pre-birth assessment process with little or no response from him. On the first planned meeting with the Trust the applicant's partner

> contacted the social worker to advise that the applicant had been at a party until the early hours of the morning and would therefore not be attending to meet with the social worker. The social worker undertook an unannounced visit to the home in place of this to explain the importance of the process to the applicant. During this visit the applicant was uncooperative in response to discussions around his family's structure, social history and lifestyle choices, laughing at times throughout discussion and refused to acknowledge or accept any of the Trust's concerns.
>
> The applicant attended one appointment to discuss the pre-birth process where he provided little information other than leaving education at a young age and having no access to benefits or social supports. The applicant remains unaccepting of the on-going domestic violence that is a feature of his relationship with his partner and continues to engage with these behaviours as recently as 13 November 2018. The applicant's criminal history is concerning and this decision-making would place the child at risk. The assessment of the applicant's criminal history shows that there would be concerns around potential risks that would be posed to the child including domestic violence, substance misuse, violence, and risky situations. The applicant's continued use of substances is worrying and would prevent him from being emotionally available to parent the child. Concerns in reference to the applicant remain very high."

The subsequent report does not paint a more positive picture in relation to the applicant although it is noted that he engaged from March 2019 with the social worker whilst in Hydebank. The reports also point out that the applicant's name has not been placed on the birth certificate meaning he does not automatically have parental responsibility for the child.

[13] Given the nature of the case being made I prompted the applicant to provide an affidavit (if consent were forthcoming) from his previous instructing solicitor. Mr Niall O'Neill has provided an affidavit of 17 December 2019. It sets out his involvement with the applicant during the course of his criminal proceedings. That is not necessarily the core of this evidence though. From paragraph 7 he deals with the issue of deportation papers and notification of detention. Paragraph 9 is the operative paragraph which (subject to editing) states that:

> "We understand that an issue has arisen as to when we were notified that the applicant would not be released and in this regard we have checked our e-mail chain with Hydebank official Ms M which indicates that we were not made aware of this issue until 3 October 2019. This was done by e-mail. We understand that the Prison Officer indicates that he spoke with either myself or our practice on 3 October in relation to the form ICD 1913. We have always found staff at Hydebank to be very helpful in liaising with this practice when it comes to legal issues and rehabilitation issues concerning detainees. The Prison Officer may well have contacted our practice in this regard, and I don't question his bona fides accordingly. However having checked our e-mails, we were fully made aware of the decision not to release the applicant on 3 October 2019 by Ms M."

[14] This is an important piece of evidence in the context of the applicant's claims about his understanding of the deportation decision. His evidence has not been provided first hand, but Mr Swift filed a fourth affidavit in relation to this in which he refers to the signed statement of a Prison Officer, Main Grade Officer dated 21 November 2019. This fourth affidavit deals with the applicant's instructions on delivery of the ICD1913 detention papers. Mr Swift states that during consultation the applicant was questioned with regards to his recollection of the delivery of the detention papers. The applicant maintained his position that when a prison officer delivered papers that the papers were delivered as he stated. The applicant confirmed that he was working with the flowers and around 4.00 pm he was waiting to return to be called to his cell. He stated that he was waiting for 10 to 15 minutes and then the Case Manager came to him and gave him papers. The applicant asked the Case Manager "what were the papers as you know I can't read anything". The applicant stated that he asked the Case Manager to read the papers to him and the Case Manager stated to the applicant that he could not as he was too busy. The applicant appears to have been asked about the Prison Officer's statement but there is no direct evidence in relation to that save that Mr Swift confirms that he spoke to Mr Niall O'Neill in relation to information sharing and that is contained in the affidavit from Mr O'Neill. Mr Swift maintains that the information sharing in the e-mail refers to IS91 and not an ICD1913.

The respondent's evidence

[15] The respondent's evidence is contained in an affidavit of Ms Alison Cousins dated 21 November 2019. In this she explains that she is the criminal case worker employed by the Home Office for 13 years and that she is authorised to provide the affidavit on behalf of the proposed respondent. This affidavit sets out the documentation relevant to this case. In particular an ICD1913 letter which is dated

2 October 2019 and informs the applicant that he was to be detained under the Immigration Act 1971 and provides the reasons for this detention. The letter also contains a confirmation of conveyance which is to be completed by the Prison Officer who conveys the correspondence to the applicant. The affidavit states that on 4 October 2019 she received by e-mail a completed confirmation of conveyance. The affidavit confirms that the returned confirmation of conveyance is dated 4 October 2019 and advises that the Prison Officer conveyed the ICD1913 letter to the applicant. It further states that the applicant refused to sign for the letter. The reasons stated are handwritten and the author states that while the writing is not clear she believes it states "refused to sign as believed solicitor had sort it out and wants to remain in the UK."

[16] At paragraph 9 of the affidavit Ms Cousins states that the applicant had previously been provided with correspondence from this office while at HMP Hydebank. This correspondence was concerning a deportation order that had been made in respect of the applicant. The affidavit refers to this confirmation of conveyance dated 21 February 2019 and states that the relevant documents were provided to the applicant by the Prison Officer and that the applicant signed for the documentation. The affidavit then refers to the bail history.

[17] A second affidavit has been filed by Mr Lee Hatton, solicitor which exhibited a statement from the Prison Officer. I was not satisfied with an unsworn statement and so the Prison Officer filed an affidavit on 16 December 2019 which contains the following information. He states he held the position of Main Grade Officer for 17 years at the prison. He states that he confirms the details given to Mr Hatton. In the affidavit he says he is unable to comment on the applicant's understanding of English or speaking ability. However, at the time of his committal, there was no indication on the internal computer system that there was a requirement for him to use an interpreter. At no time during the applicant's time in custody did he request the service of an interpreter or make use of the Big Word Telephone Interpretation Services as a tool of communication. Prison records indicate that the applicant had three legal visits between 26 February 2019 and 27 September 2019.

[18] The affidavit also states that this officer on 21 February 2019 served the applicant with Home Office documentation ICD4932EEA and that he signed for receipt. He also confirms that at this time he advised him to contact his solicitor for assistance. He says that he confirmed that he was on duty on 5 October 2019 so he delivered the Home Office documentation ICD1913 and information on Home Office bail to the applicant on Friday 4 October 2019. He says he informed the applicant that he would not be released on 8 October 2019 as would be detained thereafter by the Home Office. He confirms that on 4 October 2019 the applicant asked him to read the documentation before he would sign it. In the affidavit this officer says "I did not tell the applicant that I did not have time to read the documentation to him. I advised him to contact his solicitors as the Northern Ireland Prison Service only deliver documents on behalf of the Home Office. Northern Ireland Prison Service staff do not read or give advice on the documents".

[19] The officer also confirms that he contacted O'Neill solicitors on 3 October 2019 to inform that the form ICD1913 and information on Home Office bail had been sent to Hydebank Wood College for onward delivery to the applicant by staff. He says he called reception and left a message but did not speak to the solicitor acting on behalf of the applicant. This officer states that he can confirm that the applicant told him that he refused to sign for the paperwork and that he believed that his solicitor had already sorted this matter out. He states that he confirms that he informed the applicant that it was his choice whether he signed the Home Office paperwork or not. He handed the paperwork to the applicant and recorded on the certificate of conveyance that he refused to sign for the reasons given.

Consideration

[20] I have considered all of the evidence in this case and the arguments made by the parties. This case has evolved in that there is no longer any appeal against deportation and the removal directions will take effect from 6 February 2020. Many of the arguments have therefore become academic. However a point remains in relation to the detention itself and the issue of bail should the court grant leave. It will be apparent from my consideration that the court has struggled to get a coherent picture in this case due to the piecemeal submission of evidence, changing instructions and gaps in the evidence when provided. However it seems to me that there are number of natural questions to ask about the detention over the two periods Ms Connolly identifies i.e. from 8 October 2019 to 24 October 2019 and after 24 October 2019. The court is effectively being asked to review the decision-making on the basis of public law error and/or on the basis of breach of Article 5 and Article 8 of the ECHR.

[21] Quite correctly there was no argument made against the actual power to detain pending deportation contained in the relevant statute. Paragraph 16(2) of Schedule 2 to the Immigration Act 1971 confers powers on immigration officers to detain an individual who is held within the immigration system pending a decision whether to give directions for his or her removal and pending removal pursuant to any such directions. Similar powers are conferred on the Secretary of State by Section 62(1) and Section 62(2)(c) and (d) of the Nationality Immigration and Asylum Act 2002.

[22] Paragraph 1(3) of Schedule 2 to the 1971 Act provides that:

> "In exercising the functions under the 1971 Act, immigration officers must act in accordance with such instructions as may be given to him by the Secretary of State. It is of course accepted that there are limits to the powers to detain. In particular following the well trammelled *Hardial Singh* principles the Secretary of State must intend to deport the person and can only use the power to detain for that purpose.

> (2) The person may only be detained for a period that is reasonable.
>
> (3) If before the expiry of the relevant period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to remove the power of detention.
>
> (4) The Secretary of State should act with reasonable diligence and expedition to effect the removal."

[23] These principles are uncontroversial. The legislation provides the legal power which is not under challenge. Rather, it is the lawful application of the legislation that is at issue. In this regard Ms Connolly made particular reference to the published guidance in this area particularly paragraphs of Chapter 55 as follows:

> "55.1.1 The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of immigration bail and, wherever possible, alternatives of detention are used. Detention is most usually appropriate:
>
> (1) To effect removal.
>
> (2) Initially to establish a person's identity or basis of claim, or where there is reason to believe that the person will fail to comply with any conditions attached to a grant of immigration bail. To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations applied by domestic and Strasbourg case law but must also accord with stated policy."

Paragraph 55.1.3. provides:

> "Detention must be used sparingly, and for the shortest period necessary."

Paragraph 55.1.4 addresses the implied limitations on the statutory powers to detain and provides:

> "In order to be lawful, immigration detention must be for one of the statutory purposes for which the power

is given and must accord with the limitations implied by domestic and ECHR case law."

Paragraph 55.1.41 then sets out what are in substance the *Hardial Singh* principles.

Paragraph 55.3 is also concerned with decisions to detain. Of particular significance is paragraph 55.3.1 which highlights factors influencing a decision to detain a person. This section states that all relevant factors must be taken into account when considering the need for initial or continued detention. The legislative structure also provides for a review of detention. Again that is not a matter which is controversial in this case as appropriate reviews have taken place. Indeed there was no argument made that the decision-maker in this case had not applied that statutory criteria.

[24] The first head of claim raised by Ms Connolly is that the decision was in breach of the policy namely Chapter 55 EU Law and that other matters were not taken into account. She also relies on breach of the policy "Every Child Matters." I am unpersuaded by any of these arguments. In particular there is not an evidential basis for the argument in relation to breach of policy. The decision-making letter of 2 October 2019 sets out all of the relevant considerations in accordance with this statutory scheme when giving reasons for detention which are articulated in the decision-making letter on a number of fronts namely that the applicant is likely to abscond if granted immigration bail, previously failed to comply with conditions of bail, that the release carries a high risk of public harm, that there is a risk of further re-offending. Ms Connolly did not seek to argue that these were not valid grounds.

[25] It is also significant in my view that in the removal decision of 23 September 2019 (which is now no longer appealed) the decision-maker sets out that consideration has been given to the issues of the child. However, pertinently in that decision-making letter the clear assertion is made that no information of any substance has been given about the nature of the relationship with the child and whether or not Article 8 ties have been established. Further information was provided in correspondence of 27 September 2019 from O'Neill Solicitors. However, upon examination, this does not provide much more of substance as it simply states that "given our clients paternity has been confirmed in the documents furnished to you we would ask that our client's circumstances are reviewed in the light of his strong Article 8 right to family life." This is an obvious overstatement of the position. All of this is unsurprising given the file of papers I have received from the Family Care Centre which provides a worrying picture of this applicant's interest in this child and indeed his own behaviour towards the partner of the child.

[26] There are also serious concerns about the applicant's candour in these proceedings given the documentation I have seen from the family court. As such it is quite clear to me that the decision-maker has not erred in any substantive way in relation to consideration of a child who clearly has a tenuous link to this applicant. I accept that there is limited mention of this issue in the relevant decision-making

correspondence however that is not fatal in the particular circumstances of this case. In relation to detention the applicant could not in my view reach a standard of establishing that separation would be contrary to his Article 8 rights or the rights of the child.

[27] The case of *Makhlouf v SSHD* 2016 UKSC 59 highlights this issue although it was involved with a different point namely whether the Secretary of State should have undertaken her own independent enquiries into the best interests of his two children before deciding to deport him. That was in the context of the established principle that where children will be affected by a deportation or removal decision, their best interests must be treated as a primary consideration, and considered separately from those of the adults involved and from the public interest. At paragraph 47 Lady Hale refers to the duty to consider the interests of children as follows:

> "47. This duty stems from two sources in domestic law. First, section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to make arrangements for ensuring that her own functions in relation to immigration, asylum and nationality, and those of her immigration officers, are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The aim was to reflect in United Kingdom law the effect of article 3.1 of the United Nations Convention on the Rights of the Child, which requires that "in all actions concerning children", including those by administrative bodies, "the best interests of the child shall be a primary consideration". But even without section 55, there is a second source of the obligation, in section 6(1) of the Human Rights Act 1998, which requires public authorities to act compatibly with the rights contained in the European Convention on Human Rights, including the right to respect for family life contained in article 8; this has been interpreted by the European Court of Human Rights to include the duty in article 3(1) of the United Nations Convention: see *Neulinger v Switzerland* (2012) 54 EHRR 31 and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166. So it is quite correct to say that children must be recognised as rights-holders in their own right and not just as adjuncts to other people's rights. But that does not mean that their rights are inevitably a passport to another person's rights."

[28] At paragraph 48 of *Makhoulf* Lady Hale also comments upon the issues when she says "The problem in this case is that it is the appellant who is treating the children as a passport to his own rights, rather than as rights-holders in their own right." I accept that the facts of this case are somewhat different however the principle must hold true as children cannot simply be a passport to success in the immigration sphere. Rather, two things must happen. First any applicant must present an evidential foundation for a family life claim. In this case the applicant's foundation is weak. The child is also a young baby who has effectively had no contact. Second, the SSHD must consider the position of any child and the effect any immigration decision would have on him or her. There is a statutory obligation pursuant to Section 55 and Convention obligation. The problem in this case is that it is clear that no information was given to allow for a successful outcome. That is unsurprising given the facts. In truth the issue of the child appears to have been an afterthought.

[29] Even with these grave deficits there may still be a point to consider which is as follows. Ms Connolly essentially says that the applicant cannot properly engage in an assessment unless released. I understand this point however I do not think it provides the answer the applicant hopes for. In my view it would have more traction in a deportation appeal rather than in relation to detention pending deportation which is short term in nature. In any event the applicant has become involved with the family court by belatedly making applications and he has had representation in the family proceedings. He has also had contact with social services while in custody. It would of course be better if the applicant were in the community to progress matters however a balance needs to be struck given concerns about the applicant and his relationship with the child. Each case will depend on its own facts and I set no particular rule with this case. However, my view in this case is highly influenced by the facts which compel me to say that there has been no breach of Section 55 or Article 8 given the family relationship that exists and the very early stage for any development of that. I am bolstered in my view by the fact that the deportation appeal is now withdrawn and so the applicant's asserted case that he wished to stay in Northern Ireland to build up a relationship with his child is heavily undermined.

[30] The real point of substance in this case is whether there has been a breach of Article 5 in relation to how the applicant was informed of his detention. In that regard I accept the point made that the grant of bail is distinct from the issue of the lawfulness of the detention although the issues of eligibility for bail and lawfulness of detention are sometimes difficult to separate see *R (On the Application of Konan) v Secretary of State for the Home Department* [2004] EWHC 22. Of course the application of Article 5 involves consideration of fairly well established principles. In accordance with Article 5(2) and (4) detention must be adequately reasoned and subject to prompt and regular review by a court to comply with the procedural requirements of the ECHR provisions. Article 5(2) states that anyone arrested or

detained must be informed promptly in a language which he understands of the reasons for the arrest and of any charge against him. This applies to all cases and not just criminal charges. It requires that the detainee must be told at least the essential legal and factual basis for the detention and something that goes beyond simple reference to the source of the power see *Fox et al v United Kingdom* [1990] 13 EHRR 157.

[31] In the case of *Rusu v Austria* [2008] Application No. 34082/02 Article 5(2) was violated as inexact facts were set out in a document which was said to justify detention. So essentially the giving of reasons is an essential safeguard against arbitrary detention. It is also an important conduit to allow a person detained to make application to a court to determine the lawfulness of detention and release if detention is not lawful pursuant to Article 5(4). This allows judicial supervision of the lawfulness of the measure to which a person is subjected.

[32] In this case there are obvious evidential issues about how the applicant was informed and what he understood about the detention decision. This is because there is a conflict in the evidence filed by the Prison Officer and the evidence filed by Mr Swift on behalf of the applicant. I have already observed that the applicant's evidence on this point is second hand and is not comprised in an affidavit of a personal nature from him. I have considered this and it is obviously difficult to resolve factual disputes within judicial review but I am quite clear that the Prison Officer's evidence is to be preferred on this issue. This is particularly so because it accords with the solicitor's acceptance that the Prison Officer probably did call the office. It is clear that the solicitor received the necessary relevant information on 3 October. I have no doubt that the solicitor was informed of the actual ICD1913 form. There is also corroboration of this albeit the numbering is not the same in the e-mail exchange from Ms M.

[33] Frustratingly, the solicitor's affidavit is silent on the specifics of his knowledge. However, there is not a requirement in law to know each and every reason for detention and in my view the issues were fairly obvious in this case. That is in the context of the deportation decision having been made and appealed and a bail application having been lodged on behalf of the applicant on 8 October. I have my doubts as to whether or not the applicant is to be believed in relation to his lack of knowledge about detention or his lack of understanding but even so any deficit is remedied by the fact that his solicitor knew immediately what the position was and made a bail application which allowed him to apply to court immediately. There is no valid argument about the period after 24 October when the applicant's current solicitor's obtained the decision letter. Having examined all of the facts I do not consider that the argument regarding the preceding period, 8-24 October can be sustained either. Clearly the applicant and his advisors had enough information about the reasons for detention to allow a bail application to be made to address the risks of absconding and reoffending and the relationship with the child. The bail documents including the reasons show that these issues were canvassed. Accordingly, it is my view that there has been no breach of Article 5.

[34] The applicant has now been afforded two sets of bail refusal reasonings (one of which I have received) which refer to the risks in this case which are not just of absconding but which are due to the risk of re-offending. I borrow from the reasoning of Judge Rea who refused bail for the reasons that:

> "The applicant is entitled to be released on bail unless there are compelling reasons why bail should be refused. I consider that the applicant's recent criminal record demonstrates a high risk of re-offending and a disregard for the law and any conditions of bail that might be imposed.
>
> The applicant is currently the subject of a deportation order and while I note that this is under appeal, he has a motive to abscond and I consider that there is a real risk he will do so.
>
> I do not consider there is any basis upon which his family could control his behaviour or ensure that he abides by conditions.
>
> I do not accept that becoming a parent has caused a change in his outlook. There is no evidence that he has established any contact with his child and I am not satisfied that his claim to wish to pursue proceedings in the family court provides sufficient reassurance that he will abide by bail conditions.
>
> Bail is therefore refused."

[35] Obviously, this case must be looked at in the context of the applicant's substantial criminal record and the issues that arise from his history including the need for a European Arrest Warrant subsequent to his absconding in the past. It is therefore my view that the decision in *R(on the application of Hemmati) v SSHD* [2018] EWCA Civ 2122 which deals with Dublin III considerations is not an absolute answer to the point.

Conclusion

[36] The applicant has on balance raised an arguable case in relation to these issues. However, the substantive case must be dismissed. In truth, whilst a number of interesting points have been made they bear no relationship with the actual facts of this case. On the basis that the leave hurdle was met I will also deal with the issue of bail. I should say that I accept Ms Connolly's argument that the High Court in the context of these proceedings can look at the issue of bail on the basis of the *Turkoglu* decision which she has put to me. The recent excellent text *Bail Law & Practice in*

Northern Ireland by Katie Quinn BL and Charlene Dempsey LLB, LLM also deals with this at paragraph 7.32 and 7.33 where it says:

> "Detention decisions may be challenged by way of judicial review or habeas corpus or both together. On an application for leave to apply for judicial review or a substantive application, the Court of Appeal in England and Wales has said that the High Court enjoys, within its inherent jurisdiction, the power to grant bail as part of its power to grant ancillary orders see *R v Secretary of State for the Home Department, Ex Parte Turkoglu* [1988] QB 398. If the High Court refuses leave to apply for judicial review, it can no longer grant bail as the court is at that stage functus officio as there is no underlying proceeding to which the bail application is ancillary. The decision to grant or refuse bail in judicial review proceedings before the High Court may be appealed to the Court of Appeal. The Court of Appeal in England and Wales has also stated that bail can be granted by the Court of Appeal on a renewed application for leave to apply for judicial review."

[37] On the basis that the power is available to the High Court I can clearly say that I would refuse bail in this case given the applicant's considerable criminal record, the issues with candour that I have raised and the breach of bail on previous occasions, most recently illustrated by the European Arrest Warrant.

[38] That is not to say that issues of the length of detention are not relevant in relation to the policy and in relation to the consideration of immigration detention which has been helpfully set out in the House of Commons reports that Ms Connolly referred to. I recognise this issue. However I do pause to observe that in this case an appeal against deportation was offered in November 2019. It was then offered again on 7 January 2020 and withdrawn. It is clear to me that delays in this case cannot be fairly ascribed to the relevant authorities. I am also concerned that the applicant himself by representation on 12 December 2019 indicated his intention to remove voluntarily to Romania, although that was subsequently withdrawn. There are lessons to be learnt from this case given the passage of time which has elapsed while decisions were made by the applicant which ultimately led to a withdrawal of the deportation appeal.

[39] Accordingly, in all the circumstances of the case, I dismiss the application for judicial review.