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	ICOS No:
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **06/05/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

(QUEEN'S BENCH DIVISION)

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BETWEEN:

CZESLAW LESZKIEWICZ

Appellant:

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

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Before: McCloskey LJ, Maguire LJ and Humphreys J

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Representation

Appellant: Mr Erik Peters, of counsel, instructed by Terence McCourt solicitors
Respondent: Mr Aidan Sands, of counsel, instructed by the Crown Solicitor's Office

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McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] The appellant, a Polish national, appeals to this court against the judgment and consequential order of O'Hara J dated 27 September 2021 whereby the judge refused his application for leave to apply for judicial review. The proposed respondent is the Secretary of State for the Home Department (the "*Secretary of State*").

Factual matrix

[2] The factual matrix outlined below is based on a combination of agreed, uncontested and incontestable facts.

[3] The appellant, being a national of an EU country, settled in Northern Ireland in June 2010. On 12 July 2019 he committed a sexual offence. On 5 May 2021 he was convicted, being punished by an order with components of 7 months imprisonment to be followed by 7 months licenced release. His scheduled release date was 7 September 2021. His release did not materialise in the event.

[4] The explanation of this is that the Secretary of State's servants and agents were proposing to take deportation action against the appellant, presumably arising out of his conviction, and had notified the Prison Service accordingly. However, their paperwork was not in order. In particular, the appropriate forms (ultimately provided belatedly – infra), including any relevant formal notification, had not been served on the appellant. Under the immigration legislation certain powers of detention are vested in the Secretary of State. It may be that the Secretary of State was proposing to consider whether in light of his conviction the appellant's deportation would be conducive to the public good. Whereas it would seem that the Secretary of State's power to detain under section 36 of the UK Borders Act 2007 and/or paragraph 2 of Schedule 3 to the Immigration Act 1971 was in play, with the consequential engagement of the Immigration Rules (Part 13) and the English Court of Appeal's decision in *JS (Sudan) v SSHD* [2013] EWCA Civ 1378, this cannot be stated confidently given the limited evidence available. While the appellant was at all material times (ie from 7 September 2021) detained by the Prison Service, there are clear indications that this was at the instigation of the Secretary of State. It is neither necessary nor possible for this court of supervisory jurisdiction to entangle the legal and factual intricacies of the matrix.

[5] The appellant's extended period of detention spanned the phase 7 September to 2 November 2021. During this period there was a series of communications between his solicitor and the Secretary of State's agents. These disclose an unsatisfactory and inconclusive state of affairs. On 20 September 2021 a PAP letter was sent. Thereafter, the issue of possible service of Form IS.91 continued to dominate exchanges. A PAP response dated 22 September 2021 attached a hitherto unserved Form IS.91 and an uncompleted Form B1. While the description "IS.91" featured in counsels' submissions, the identifying letters on the actual form are "COHID … DEP NRA".

[6] On 24 September 2021 judicial review proceedings were initiated. On the same date the appellant received the aforementioned two forms and certain other materials. On 27 September 2021 the High Court heard the application for leave to apply for judicial review, dismissing same. On 12 October 2021 the appellant was transferred from HMP Maghaberry to the Dungavel Immigration Detention Centre in Scotland. On 2 November 2021 he was granted bail by the First-tier Tribunal.

[7] The chronology ends here. Upon receipt of the appellant's appeal this court, mindful of the high speed nature of the proceedings at first instance and proactively raising the question of whether this appeal is academic and/or otherwise unsuitable for consideration, made provision for further affidavit evidence to be filed. This

resulted in extensive affidavits sworn by the appellant and his solicitor. Neither of these affidavits addresses the issue of events post dating 2 November 2021 and, in particular, the appellant's present immigration status or the progress of the threatened deportation action. The Secretary of State filed no evidence.

The Challenge

[8] O'Hara J based his refusal to grant leave on his assessment that the challenge had become academic.

[9] Before this court Mr Erik Peters, of counsel, advances the following core submissions:

> "(a) From 7 September to 24 September 2021 the Appellant was unlawfully detained.
>
> (b) The formal notices *et al* provided on him did not materialise until after these proceedings had been issued and were not explained to him in any language.
>
> (c) The judge erred in holding that the matter had become academic following service of the notices *et al* and it would be open to the Appellant to bring a separate claim for damages.
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> (d) The Appellant should be granted declaratory relief because (i) "… the application concerns matters of the general public interest/importance likely to arise again …" and (ii) "in the circumstances is it unjust or inconvenient to withhold the declaration because the LSA will have to fund action where the Respondent was at fault and the [Appellant] will have to attempt to resolve the matter in another court whereas a declaration would likely persuade the SSHD to settle any non-adversarial setting."
> [*sic*]

[10] The factual matrix before this court is manifestly incomplete. This is the result of choices made by the parties. What is rehearsed in paras [2] – [6] above reflects the court's best attempt to identify those factual matters which are clear. However, there are multiple gaps, descending into issues of dense factual detail commonly encountered in cases where there is a challenge to the legality of a person's detention.

[11] It was stated in *Re Alexander's Application* [2009] NIQB 20 at para [27]:

> "… a challenge to the lawfulness of an arrest should in virtually every conceivable instance, be pursued by way of a conventional **lis inter partes** ….
>
> In almost all cases, the issues which arise are far more comfortably and satisfactorily accommodated in a form of proceedings which involves the giving of oral testimony and the testing of claims and counterclaims under cross examination."

This passage is especially apposite as it is abundantly clear that the appellant has available to him an entirely adequate alternative remedy, namely a civil action for damages for false imprisonment against the appropriate tortfeasor, whatever the merits of such claim.

[12] On the other hand, the proposed respondent, the Secretary of State, has been permitted to participate fully in these proceedings from the outset and, like the appellant, owes a duty of candour to the court. As the order of the High Court rehearses (in the usual way) the Secretary of State, represented by counsel, has participated from the beginning upon the invitation of the court. The failure of the Secretary of State to adduce any evidence is unsatisfactory. The adduction of evidence would be expected to have rectified the evidential gaps noted. The absent evidence is, presumptively, in the Secretary of State's possession. Furthermore, at first instance the context was one involving the liberty of the citizen, thus calling for maximum cooperation with the court. Finally, there was no suggestion that the appellant's extended detention during the period under scrutiny was not at the instigation of the Secretary of State. We would add that, without presuming to try or determine this issue, the available evidence points in this direction.

Disposal

[13] There is obvious merit in Mr Sands' submission that these proceedings are undermined by the appellant's failure to pursue the alternative remedy available to him. On the other hand, Mr Peters submits correctly that the remedy of a declaration granted by this court (or, upon remittal, the High Court) would be of practical utility to his client. This court must also be mindful of the overriding objective.

[14] Balancing everything, and taking into account the discretionary powers available to this court, we have identified a course which in our estimation best furthers the overriding objective and, simultaneously, has obvious pragmatic attraction.

[15] As there is prima facie evidence of an unlawful failure of the Secretary of State and their agents to discharge the public law duty, or implied statutory duty, to

exercise their statutory powers efficiently, expeditiously and timeously in a context of deprivation of liberty, we consider that the modest threshold for granting leave to apply for judicial review is overcome. In furtherance of the overriding objective, we decline to either determine substantively the merits of the appellant's case or to remit it to the High Court for this purpose. The shortcomings in the evidence per se militate against this course. It is further contraindicated by the overriding objective. We are mindful of the decision in *Alexander* and also note that one of the remedies pursued by the appellant is damages. In these circumstances, having granted leave to apply for judicial review, in the exercise of our discretion and pursuant to section 38(1) of the Judicature (NI) Act 1978 and Order 53, rule 9(5) of the Rules of the Court of Judicature (NI) the following order is made:

(i) The order of the High Court is varied to the extent that leave to apply for judicial review is granted.

(ii) These proceedings shall continue as if they had been begun by writ.

[16] It is appropriate to add that by reason of the terms of Order 53, rule 9(5) the grant of leave to apply for judicial review is a prerequisite to a conversion to writ order.

Costs

[17] The appellant is a legally assisted person. At first instance the court ordered that his costs be taxed accordingly and made no order as to costs inter – partes. This court has found that the grant of leave to apply for judicial review is appropriate, differing from the first instance judge to this modest extent, while declining to enter into the substantive merits of the challenge. The effect of our conversion to writ order is that, ultimately, there will have been a single, indivisible action. Thus, any order regarding costs would be premature. Further, there is no clear final winner at this stage. It follows that all costs incurred to date are reserved. Both parties will doubtless be alert to the desirability of early resolution if possible.