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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR185
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME OFFICE

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Ms Connolly BL (instructed by Law Centre NI) for the Applicant
Mr Sands BL (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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COLTON J

Introduction

[1] I gave an ex tempore judgment in this matter on Monday 8 November 2021. The parties have asked for a transcript of the judgment. I have listened to the transcript and have "tidied-up" the text, so that the parties can have the benefit of a written judgment.

[2] I want to thank counsel for their written and oral submissions in this matter. I also confirm the order for anonymity made in respect of the applicant who shall be known as JR185. That order is made to protect the identity of her children who are an important feature of this application.

[3] The applicant is a Nigerian national who was born on 14 June 1995. On 7 October 2018 she had been granted a visitor's visa to the United Kingdom. She arrived in the UK on 12 February 2019 with her Nigerian born son whose date of birth is 24 December 2017. On 13 February 2019 she travelled to Northern Ireland. On 15 February 2019 she applied for asylum and humanitarian protection in the United Kingdom. Her son, of course, was a dependant relative on the asylum claim. On 5 March 2019 she underwent an asylum screening interview and that was

followed by a substantive asylum interview on 20 May 2019. On 3 July her application for asylum was refused by the proposed respondent. The applicant's claim was based essentially on fear of violence from her husband and his family should she return to Nigeria. In refusing the application it was concluded by the decision-maker that in light of all the evidence available:

> *"I have decided that you have not established a well-founded fear of persecution so you do not qualify for asylum."*

[4] It was also determined that she did not qualify for humanitarian protection and that her removal from the UK was not a breach of her rights under Article 8 of the European Convention on Human Rights. Finally, it was concluded that she did not qualify for discretionary leave on the grounds of breaches of Articles 2, 3 and 8 of the Convention. A crucial factor in the decision was the decision-maker's assessment of the applicant's credibility or reliability. Her responses at the asylum interviews were heavily criticised as 'evasive', 'incoherent', 'vague' and 'internally inconsistent.' On 23 December 2019 the applicant lodged an appeal in respect of the decision to the Immigration and Asylum Chamber, the First Tier Tribunal ("FTT"). This right is provided for under section 82 of the Nationality Immigration and Asylum Act 2002. On 21 September 2020 the applicant gave birth to her second child. On 4 and 29 March 2021 the applicant was medically examined by Dr Helen Harbinson, Consultant Psychiatrist, who issued a report on 29 March 2021. She concluded in the report that at the time she examined the applicant she was presenting as mentally well. In her conclusion she said:

> *"The applicant left Nigeria with her young son in fear of her life. The role of a single parent is challenging at the best of times. The applicant was a single parent in a foreign country isolated and afraid. Her sleep was poor and her mood low. Her symptoms on arrival in Northern Ireland would be consistent with an adjustment disorder. Adjustment disorders are states of subjective distress and emotional disturbance usually interfering with social functioning and performance and arising at a period of adaptation to a significant life change or to the consequences of a stressful life event. The manifestations vary and include depressed mood, anxiety, a feeling of inability to cope, plan ahead or continue in the present situation and some degree of disability in the performance of daily routine. She recovered over a period of approximately a year."*

[5] Dr Harbinson went on to say that while her adjustment disorder would have adversely affected her concentration, her communication style is a significant additional problem. She answers the questions she is asked and does not elaborate. She found it very important when asking her questions to seek clarification. The mental health social worker who interviewed her commented in her correspondence on the fact "*the applicant does not elaborate*" and she then gives a specific example.

Dr Harbinson also points out that the presence of her young son at her substantive interview was a significant additional stressor which would also adversely affect her concentration.

[6] There were then some further clarifications sought from Dr Harbinson. She indicated on 30 April 2021 in relation to a query that whilst the applicant's adjustment disorder would have adversely affected her concentration her communication style is a significant additional problem. On further clarification on 18 May she indicates in response to a query from Mr Lockhart of the Law Centre that her adjustment disorder and communication problems would have impaired her ability to participate but not rendered her unfit for interview. On the basis of that medical evidence and armed with Dr Harbinson's report and clarifications a pre-action response letter was sent to the proposed respondent on 9 April 2021. In that letter the applicant sought a declaration that the asylum refusal decision of 3 July 2019 was unlawful and that it was vitiated by procedural unfairness. The applicant therefore sought the following primary relief in judicial review:

(i) An order of certiorari to quash the decision made on 3 July 2019.

(ii) A declaration that the impugned decision made on 3 July 2019 was unlawful.

(iii) An order requiring the proposed respondent to remake its decision in accordance with the law.

[7] On 14 April the proposed respondent gave a very succinct response and indicated at paragraph 5 of the response that:

> "*Firstly, it is noted that your client has exercised her remedy against the refusal decision in the form of an ongoing appeal, … Therefore, it is considered that the new and compelling medical evidence referred to in her pre-action letter can be raised during the appeal process for an immigration judge to consider.*
>
> *Secondly, it was pointed out that you also have the option of withdrawing the existing appeal and lodging the new medical evidence as part of a further submissions application which will then be considered by the relevant Home Office team.*
>
> *Consequently, the decision of 3 July 2019 which refused your client's asylum application will not be withdrawn and considered*."

[8] These proceedings were then issued on 14 July 2021. The FTT Appeal hearing was listed for 20 July 2021 but was adjourned pending the outcome of this application.

[9] The Order 53 Statement identifies two impugned decisions, the first is the substantial decision of 3 July 2019 and the second is the decision of 14 April 2021 in the PAP response to refuse to withdraw the refusal decision.

[10] Turning to the grounds upon which the applicant relies. The first ground, relates to the underlying substantial decision. At its heart the challenge is based on a complaint of unfair procedure. It is submitted that the psychiatric report of Dr Harbinson and supplemental opinion confirms that when the applicant underwent the asylum interviews she was suffering from a mental disorder, namely an adjustment disorder. She was not unfit for interview but her condition impaired her ability to participate in the interview and adversely affected her concentration. This report was obtained by the Law Centre due to their concern about the applicant's mental health which arose during the preparation of her asylum appeal. It is submitted on behalf of the applicant that in light of this diagnosis the validity of the responses provided by the applicant at interviews which are heavily criticised as 'vague', 'evasive', 'internally inconsistent' and 'incoherent' must now be called into question. Ms Connolly submits that the applicant was entirely disadvantaged during this key investigatory stage and unable to fully engage with the immigration officers so that in turn she could discharge the burden of proving her claim to the Secretary of State for the Home Office.

[11] The applicant also alleges that the respondent is in breach of her duty under section 55 of the Border Citizenship Immigration Act 2009 which imposes an important duty to safeguard and promote the welfare of a child in the UK when discharging immigration or asylum functions. It is argued that the failure to withdraw the decision is a breach of this duty.

[12] It is also argued that the failure to withdraw the original decision having been informed of Dr Harbinson's opinion is irrational in the Wednesbury sense. Further, it is argued that in refusing to withdraw the decision the proposed respondent is in breach of its own policy. That policy is set out in Ms Connolly's written argument namely, "Asylum Interviews version 8" published on 3 June 2021 which provides under **Particular Needs** that:

> *"In the interests of fairness, you should not normally cancel or suspend an interview because of past or present mental illness. The exception to this is if the claimant is clearly unable to cope or engage with an interview and where the reliability of what they say could be called into question.*
>
> *If a letter from a GP, consultant or other appropriately qualified relevant healthcare professional regulated by the GMC, HCPC or NMC is received confirming that the claimant is unable, for the foreseeable future, to cope with an interview, you should consider omitting the personal interview and taking written*

evidence in accordance with paragraph 339NA of the Immigration Rules."

[13] She argues that the consequences of failing to withdraw the impugned decision and proceeding to the immigration appeal is that reliance would continue to be made on the asylum interviews. She says that that approach is manifestly contrary to the policy.

[14] Finally, Ms Connolly also argues that in reaching the decisions about which she complains the proposed respondent acted in breach of the applicant's right to a fair hearing which includes the right to participate fairly in the investigatory stage of the asylum claim.

[15] In considering this matter it is essential to identify what decision is being impugned and on what grounds. It is clear that the underlying decision is that of 3 July 2019. An obvious problem with that for the purpose of this application is the issue of delay. It was first challenged by way of correspondence on 9 April 2021, one year and nine months post decision, with these proceedings being issued two years post decision. The applicant says that the grounds giving rise to the application only arose or crystallised on 30 March 2021 on receipt of Dr Harbinson's report. It will be noted that proceedings were not issued within three months of that date but just shortly after that. However, the court need not trouble itself on the issue of delay in relation to the decision of 3 July 2019, on the simple basis that there are no arguable grounds upon which the court could have set the decision aside at that time. The report of Dr Harbinson was not available to the decision-maker. The challenge to the decision is based on ex post facto reasoning in a medical report prepared 20 months later. If one examines the factual context at the time the decision-maker made the decision it will be seen that the applicant, who is a university graduate in security and intelligence studies, had already been in receipt of legal advice from her solicitor prior to the substantive interview on 20 May 2019. Her solicitor was physically present during the interview itself and, indeed, had helped her complete the asylum application. Her main language is English according to the response to the questionnaire. At the screening interview the applicant declared that she had no medical conditions. In her statement of evidence of 25 April 2019 she confirmed that she had no medical conditions. Neither the applicant nor her representatives made the case at interview that her answers were in any way unreliable due to any mental illness, lack of communication skills or the presence of her young son during the interview.

[16] As to an alleged breach of section 55 as of July 2019 the applicant had only one child. It is clear from the decision that the decision-maker took into account the fact that the applicant had brought a child from Nigeria who was then one and half years old. The decision-maker rejected the allegation that if the applicant returned to her own country her child would be taken away. The decision-maker fully considered and applied the immigration rules on private life and family life and

specifically considered whether the refusal of asylum would result in unjustifiably harsh circumstances for her or her child and decided that it would not.

[17] There is no basis upon which this court could conclude that the decision of 3 July was unlawful or vitiated by procedural unfairness. It was a decision which was reasonably open to her on the facts as they were known and all the evidence before her. It is not arguable that the decision was in any way unlawful.

[18] The question that arises is does the PAP response constitute a decision which can be challenged by way of judicial review? In truth it is a refusal by the proposed respondent to withdraw the decision on 3 July 2019 and commence a fresh interview process which is the real target of the challenge. The proposed respondent argues that this is not a fresh decision that is capable of review. It is not a fresh asylum decision but it is a response to the applicant's challenge making the simple point that the decision of 3 July 2019 is now under appeal and the correct forum for raising new evidence is the First Tier Tribunal or, alternatively, the applicant has the option of withdrawing the existing appeal and making a further submissions application to the Secretary of State. In short, Mr Sands says this is a misconceived attempt to use a PAP response to mount a fresh JR application which is ostensibly within time.

[19] Properly analysed this is an application to quash the decision of 3 July 2019 based on new evidence. That new evidence is the medical report of Dr Harbinson which puts forward a potential explanation for the issues in relation to the applicant's purported unreliability which led to the refusal decision. The extant appeal brought by the applicant will enable her to utilise that new evidence in her claim for asylum. The court fully acknowledges the importance of a proper investigation interview process in the determination of asylum claims. The content of the interviews will be before the FTT. It is, of course, correct as the FTT judge has confirmed in a recent review of the appeal, that he cannot direct that the original decision be withdrawn and a new interview take place. He cannot expunge the record of the asylum interviews. However, as the court has already found that decision and interview process was not unlawful. Even if Dr Harbinson's report had been available on the day of the interview on 20 May 2019 it would not have been in breach of the policy relied upon by the applicant to proceed with the interview. As referred to previously the policy makes it clear that interviews should not normally be cancelled on grounds of mental illness. This should only occur if a claimant is clearly unable to cope or engage with an interview and where the reliability of what they say can be called into question. Neither the applicant nor her representative provided any indication at the interview that the applicant was unable to cope or that what she was saying was unreliable due to mental illness. Indeed, Dr Harbinson does not go so far as to say that herself, nor does she address the specific contents of the interview itself.

[20] The emergence of new evidence is a common feature of asylum claims. In this case since the decision of 3 July 2019 the applicant has given birth to another child and she has obtained the medical opinion of Dr Harbinson. The FTT will be

obliged, in accordance with the principle enunciated in the Supreme Court in *R(TN (Afghanistan)) v Secretary of State for the Home Department* [2015] 1 WLR 3083, to determine the applicant's appeal on the basis of the factual situation at the time of the appeal decision. Given the basis upon which this case is being argued the court assumes that the Secretary of State will consent to the admissibility of Dr Harbinson's evidence at this appeal. In short form the extant appeal is an appropriate and effective remedy in relation to the applicant's complaint in the sense that the FTT can consider the new evidence and assess her asylum claim in light of that evidence. It is appropriate because it is the statutory mechanism by which an applicant challenges a decision of the Secretary of State. It is part of the statutory architecture to deal with asylum claims. The scope of the FTT is wide ranging. It can hear evidence from the applicant, from Dr Harbinson, or indeed, from the applicant's solicitor. She can make and, indeed in her written submissions, has made the case that her mental health was adversely affected at the time of her interviews. The FTT must assess the applicant's claim for asylum on the merits. It must take into account the Secretary of State's immigration policies, the applicant's Article 2, 3 and 8 rights and must comply with its duty under section 55 in respect of the applicant's dependent children. In this regard I refer to the comments of Baroness Hale in the case of *MS* which was dealing with the immigration appeals in a slightly different context but at paragraph 11 of the judgment in that case she says:

> *"The Secretary of State now concedes that when determining an appeal that removal would breach rights protected by the ECHR, the Tribunal is required to determine the relevant factual issues for itself on the basis of the evidence before it albeit giving proper consideration and weight to any previous decision of the defendant authority. Hence, it is now common ground that the Tribunal is in no way bound by the decision reached under the NRM nor does it have to look for public law reasons why that decision was flawed. This is an important matter. As the AIRE Centre and ECPAT UK point out, had the Tribunal been bound by such decisions it could have had a profoundly chilling effect upon the willingness of victims to engage with the NRM mechanism or feel it would prejudice their prospects of a successful immigration appeal."*

[21] Baroness Hale goes on to say that there are several reasons why the Tribunal cannot be bound by the NRM decision. First, its jurisdiction is to hear appeals against the immigration decisions of officials. It does not have jurisdiction judicially to review the decision of the competent authority under the NRM. An appeal is intrinsically different from a judicial review. Second, these appeals are clearly intended to involve the hearing of evidence and the making of factual findings on relevant matters in dispute. The First Tier Tribunal Rules make detailed provision for the calling of witnesses and the production of documents. Third, that this was the role of the Tribunal was made crystal clear by the House of Lords in the well-known case of *Huang*. That case concerned individuals who had not qualified

for leave to enter or remain under the immigration rules but claimed that to deny them leave would be incompatible with their rights under Article 8. Discussing the predecessor to the 2002 Act in section 65 of the Immigration and Asylum Act Lord Bingham said that:

> "*These provisions, read purposively and in context, make it plain that the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful and incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it.*"

[22] The court considers that the prosecution of the applicant's statutory appeal is in practical terms an effective remedy in the circumstances of this case. The applicant can rely on the new evidence together with her own evidence (Dr Harbinson confirms she is now well) if she wishes to explain any weaknesses in her asylum interview. The FTT can assess all the available evidence, pay appropriate weight to the new material and assess the claims fairly and in accordance with the law.

[23] In terms of costs or convenience it is also the appropriate course of action. The appeal is ready to be heard. The course suggested by the applicant involves a full judicial review hearing involving substantial costs, which if successful, will require a fresh interview process and the potential panoply of appeals should the applicant be disappointed by that decision.

[24] The court recognises and acknowledges the second affidavit from Mr Lavery, solicitor on behalf of the applicant, who summarises and refers to the decision of the FTT judge in the Case Management Review in which he says that he is not persuaded at this stage that the First Tier Tribunal is in a position to provide an effective remedy against the complaints now made by the appellant. By this he means that he cannot expunge the record and simply disregard the record of interview with the applicant about which she now complains. However, he can decide the applicant's asylum claim fully utilising the evidence of Dr Harbinson, as the court has indicated.

[25] Not only is the appeal mechanism open to the applicant but it is also open to her to make a fresh submissions claim under paragraph 35 of the Immigration Rules. Dr Harbinson's report is an example of new evidence but it does not vitiate the original decision although it may persuade the decision-maker to change her mind.

[26] The court fully understand the reasons put forward in the affidavit of Ms Parks, solicitor, on behalf of the applicant why she cannot recommend that course of action to the applicant as this would require withdrawing the existing appeal. It is the court's view that given the extant appeal and the nature of that appeal such a course of action is not necessary but it does remain open to her if she wishes to take that course of action.

[27] The court therefore concludes that there is no arguable case that the original decision of 3 July 2019 was unlawful or that the new evidence from Dr Harbinson justifies it being withdrawn. This is the fundamental weakness of the applicant's case for judicial review. Insofar as any issues arise from Dr Harbinson's report the proposed respondent is correct in arguing that the original decision should not be set aside on the grounds that the applicant has a suitable and effective alternative remedy by way of a statutory appeal to the FTT which she has exercised and which Tribunal has jurisdiction to decide all the new issues that are raised in this application. It can determine the reliability of the applicant's evidence on the basis of all the material before it in accordance with its obligations and in accordance with law. It is not in any way fettered or bound by the view taken by the original decision-maker who did not have the benefit of Dr Harbinson's report.

[28] For those reasons leave to seek judicial review against the proposed respondent is refused.