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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW)

BETWEEN:

OMAR MAHMUD

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

[No 2]

Mr Frank O'Donoghue KC and Mr Robert McTernaghan , of counsel (instructed by MacElhatton & Co, Solicitors) for the Appellant
Mr Tony McGleenan KC and Mr Aidan Sands, of counsel (instructed by the Crown Solicitor's Office) for the Respondent

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Before: McCloskey LJ, Horner LJ and Colton J

<u>McCLOSKEY LJ</u> (delivering the judgment of the court)

INDEX

Subject	**Paragraph No**
Preamble	1
History	2-4
Relevant Factual Matrix	5-7
The Immigration Rules	8
The Impugned Decision of SSHD	9-10
The Decision in JM4	11-16
Analysis	17-28
Conclusion	29

Preamble

[1] Much of the text which follows in paras [2]–[5] is borrowed from the earlier judgment of this court, differently constituted, reported at [2023] NICA 4. The earlier judgment was generated by the necessity to address the issue of whether this appeal is out of time. The court determined this issue in the appellant's favour.

History

[2] Omar Mahmud ("the appellant"), a foreign national, applied unsuccessfully for asylum in the United Kingdom. He subsequently provided "further submissions" (in the language of the Immigration Rules). These were rejected. Both this rejection decision and a consequential decision rendering the appellant homeless were challenged by the initiation of judicial review proceedings. The appellant ultimately secured a partially favourable decision of the Northern Ireland High Court by the judgment of Mr Friedman KC sitting as a High Court Judge delivered on 22 January 2021: see [2021] NIQB 6.

[3] The extent of the appellant's success is gauged by the terms of the declaration made by the court:

> "The failure of the respondent to provide accommodation and ancillary support to the applicant [pursuant to section 4 of the Asylum and Immigration Act 1999] between the 24 August 2018 and the 7 February 2019, on the facts of this case as found by this court and as set out at paragraphs [136] and [137] amounted to and constituted inhuman and degrading treatment of the applicant contrary to his rights pursuant to Article 3 of the European Convention on Human Rights."

As this text indicates the appellant's challenge to the "further submissions" rejection decision was unsuccessful. The author of the impugned decisions was the Secretary of State for the Home Department ("the SSHD").

[4] The adjudication of the High Court continued, giving rise to a further judgment delivered on 31 March 2021: see [2021] NIQB 37. By this judgment the court determined the appellant's claim for damages. The court decided that an award of £1750 damages should be made to him. The ensuing final order of the High Court is dated 1 April 2021. This is a composite order encompassing both of the judgments delivered. By his Notice of Appeal dated 27 April 2021 the appellant seeks to challenge before this court <u>only</u> that element of the first of the two High Court decisions whereby his challenge to the Secretary of State's rejection of his further submissions was dismissed by the High Court.

Relevant factual matrix

[5] While the factual history is now protracted, spanning some ten years, the material factual matrix can be reduced to compact terms. The appellant, having entered the United Kingdom on 04 September 2013, made a claim for asylum which was refused by the Secretary of State. His ensuing appeal to the First-tier Tribunal ("FtT") was dismissed. Between 2015 and 2018 further submissions to SSHD were made on the appellant's behalf by his former solicitors eight times. These were based on a combination of medical evidence, information about conditions prevailing in the appellant's country of origin and, most recently, the fact and circumstances of his father's death. These culminated in a further negative decision by SSHD, dated 10 October 2018, which is the decision impugned in these proceedings.

[6] The appellant's desperate plight during the later phase of the aforementioned period is rehearsed in paras [3]–[6] of the judgment at first instance. In short, he was rendered homeless and destitute.

[7] The substance of the appellant's asylum claim, together with the grounds on which it was dismissed by both SSHD and the FtT, is rehearsed in paras [12]–[15] of the judgment. The exercise in which the appellant and his legal representatives were engaged subsequently was one of endeavouring to advance a fresh claim for asylum based on further submissions under the regime of paragraph 353 of the Immigration Rules. This is rehearsed in paras [17]–[18] of the judgment.

The Immigration Rules

[8] Before turning to the impugned decision of SSHD it is appropriate to reproduce the relevant provisions of the Immigration Rules. The first is paragraph 353:

> "353. When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> > (i) had not already been considered; and
> >
> > (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its

> rejection. This paragraph does not apply to claims made overseas."

The second is paragraph 353A:

> "353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."

The impugned decision of SSHD

[9] As the judge noted, the most important features of the further submissions triggering the impugned decision were the twofold assertion by the appellant that (a) he would be killed if forcibly returned to his country of origin and (b) his father had been murdered. SSHD considered these assertions implausible, with the result that the test for a fresh asylum claim was not satisfied. Pausing, implausibility had been the central theme of all previous executive and judicial determinations adverse to the appellant.

[10] The kernel of the impugned decision is expressed in the following concluding words:

> "I have concluded that your submissions do not meet the requirements of paragraph 353 of the Immigration Rules and do not amount to a fresh claim. The new submissions taken together with the previously considered material do not create a realistic prospect of success. This means that it is not accepted that should this material be considered by an immigration judge, this could result in a decision to grant your asylum ….
>
> I have decided that the decision of 1st August 2014 upheld by the immigration judge on 21/3/15 should not be reversed."

It will be necessary to subject the impugned decision to careful analysis, infra.

The decision in JM4

[11] The decision of the High Court in *JM4* [2019] NIQB 61 has consistently formed the centre piece of the appellant's case. In para [14] of its judgment the High Court rehearsed the framework of legal principle applicable in decision making to which para 353 of the Immigration Rules applies. The court took as its starting point the standard of anxious scrutiny applicable in every case. Its formulation of the governing legal principles was the following:

> "In short, while the Wednesbury principle provides the standard of review, it is calibrated to the extent that the legal barometer of irrationality is that of anxious scrutiny; a reviewing court must pose the two questions formulated in *WN (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, namely whether SSHD has asked the correct question ie whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, concluding that the Applicant will be exposed to a real risk of persecution on return and, secondly, whether SSHD has satisfied the requirement of anxious scrutiny; a reviewing court is not necessarily precluded from applying other recognised public law standards of review; SSHD's own view of the merits of the materials provided is a mere starting point; and the overarching test is that of anxious scrutiny."

It is also appropriate to reproduce in full paragraph [6] of the leading English authority on this subject, *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, at [6]:

> "There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not `significantly different' the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must

> also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source."

[12] The next noteworthy feature of *Re JM4* is that it concerned a challenge which, by virtue of the text of the impugned decision, had in substance the same material characteristics as the present case. The impugned decision was couched in precisely the same terms as those reproduced immediately above. The court, elaborating upon its exposition of the framework of legal principle reproduced in the preceding paragraph, stated at para [19]:

> "Given the legal standards in play, there is no real scope for the restrained `in bonam partem' approach to this key passage. As *WN (DRC)* makes clear, it was incumbent upon the decision maker to pose the question of whether there was a realistic prospect of a tribunal, applying anxious scrutiny – and, I would add, applying the `lower' standard of proof applicable in asylum cases – concluding that the Applicant would be exposed to a real risk of persecution on return to Zimbabwe. I am unable to identify the central ingredients of this test in the text of the impugned decision. The decision maker simply expressed his personal, subjective opinion and concluded that this was determinative of how a tribunal would approach and decide the case in the event of an appeal proceeding. Furthermore, the decision maker displayed no awareness of the requirement that his views were simply a starting point in the exercise. On the contrary, the decision maker's approach <u>in substance</u> was that of treating the fresh representations as an original application. Finally, there is a patent misdirection in the `should not be reversed' sentence. This discloses that the decision maker, erroneously, considered that his role was to determine whether the decision of the FtT should be affirmed. This is remote from what is required by Paragraph 353 of the Rules. Given all of the foregoing, there is a clearly demonstrated misdirection in law."

[13] The court then turned to consider the separate issue of whether SSHD had breached its duty under section 55(3) of the Borders, Citizenship and Immigration Act 2009 which stipulates that in a case of this genre the decision maker "must" have regard to the statutory guidance promulgated under section 55(1). The argument on behalf of SSHD was that no material breach had occurred on account of two factors, namely consideration had been given to the children's best interests in the original

asylum refusal decision and no mention of the children had been made in the appellant's further representations: see para [22]. The court resolved this issue also in favour of the appellant, as appears from paras [24]–[25]:

> "There is some merit in Mr Sands' submissions. However, standing back, I consider that there are simply too many gaps, question marks and concerns to warrant the conclusion that SSHD's demonstrated breach of Section 55(3) has no material consequence. The evidence previously considered and the best interests assessment previously made were both of considerable vintage, over four years old, at the time of the impugned decision. Four years is a long period in the life of every child. In addition, any such assessment would itself almost certainly have involved a breach of section 55(3). Furthermore, the consideration that, evidentially, there are indications of parental separation at certain stages, coupled with those features of the representations made highlighted in [17] above, must give rise to unease on the part of the court that the Applicant was primarily focussed on his own interests and not those of his children. This is typical of one of the cases for which, in my view, Section 55(3) is designed to cater."

[14] In *Re Chudron* [2018] NIQB 58 and [2019] NICA 9, another paragraph 353 case, the applicant's challenge to the Secretary of State's refusal decision failed both at first instance and on appeal. The self-directions in law formulated by the decision maker are not reproduced in either judgment. In this respect there is one short passage in the judgment of the lower court, at para [13](x) of relevance:

> "The decision maker states that taken together with the previously considered submissions and the previous findings with regard to credibility you failed to show that your claim warrants a departure from the findings of the Immigration Judge."

This is framed in reported speech and does not purport to quote the words actually used. Furthermore there is no indication that the impugned decision was challenged on this discrete basis. On the face of the judgment, the issues upon which the parties mainly joined issue related to the strength and merits of the new material on which the applicant was relying: see para [16]. For these reasons, the submission of Mr McGleenan KC on behalf of the Secretary of State in the present case that the passages in the impugned decision which the appellant criticises withstood the challenge in *Chudron* is unsustainable. While the judgment of the Court of Appeal quotes verbatim from the decision letter – at para [3] – the passage reproduced does not compare with the reported speech noted above.

[15] The decision of the Inner House of the Scottish Court of Session in *SM v Secretary of State for the Home Department* [2022] CSIH 21 post-dated that of the judge at first instance in the present appeal. This is another paragraph 353 case. The self-directions in law of the decision maker are reproduced in full in para [11] of the report. The relevant passages concluded:

> "I have concluded that your submissions do not meet the requirements of paragraph 353 of the Immigration Rules and do not amount to a fresh claim. The new submissions taken together with the previously considered material do not create a realistic prospect of success. That means that it is not accepted that should this material be considered by an Immigration Judge, that this could result in a decision to grant you asylum, Humanitarian Protection, limited leave to remain on the basis of your family and/or private life, or Discretionary Leave for the reasons set out above. I have decided that the decision of 11 September 2016 [sic] upheld by the Immigration Judge on 12 April 2016 should not be reversed."

The unanimous opinion of the House was delivered by Lord Doherty. At paragraph [13], referring to *JM4*, he stated:

> "The operative part of that decision letter [was] materially different from the decision letter [under challenge]."

Thus the petitioner's invocation of *JM4* did not avail him. This is particularly clear from paras [23] and [24]:

> "The main difficulty in **JM4** was that there was no satisfactory indication in the decision letter that the decision maker had properly applied his mind to whether there was a realistic prospect of success before an Immigration Judge. He appeared simply to have approached matters by reference to his own view of the merits of the new material. That is not a criticism which the petitioner has made good in the present case ….
> ….
>
> The important difference is that in **JM4** there was no indication in the decision letter that the decision maker had applied the correct test. The statement [that the earlier decision of the Immigration Judge should not be reversed] reinforced the concern that he had not. Here, by contrast, we do not have the same concern because we

> are satisfied from the terms of the decision letter as a whole that the decision letter did address the correct test … "

The exercise of juxtaposing the immediately preceding passages with that reproduced above (excerpts from the decision letter) makes abundantly clear why the Inner House made this assessment and conclusion.

[16] In the present case it has not been contended on behalf of the Secretary of State that the impugned letter of decision is couched in the same, or substantially the same terms as that in *SM*. A forensic analysis of the relevant text confirms why this submission was not advanced. In short, the first two paragraphs of the four paragraphs reproduced in para [11] of *SM* do not feature in the decision letter in the present case. It follows that the decision in *SM* does not give rise to any divergence in approach to paragraph 353 cases in the jurisdictions of Scotland and Northern Ireland. *JM4* was correctly distinguished in *SM* without any reservations about its reasoning or the correctness of the outcome.

Analysis

[17] At first instance the central argument advanced was that having regard to the decision in *JM4* the impugned decision must be condemned as it suffers from the same misdirection in law. At para [48](vi) the judge recorded:

> "It was not disputed by [counsel for SSHD] that the phrase 'I have decided that the decision of [date] upheld by the Immigration Judge on [date] should not be reversed' is a misdirection as regards the fresh claim aspect of paragraph 353. It determines a different – anterior – question as to whether the previous decision to refuse asylum and protection should be upheld."

[18] We would highlight two features of the immediately preceding passage. First, there was in substance a concession that a misdirection in law had been committed by the decision maker. Second, if and insofar as the judge considered that it was appropriate for the decision maker to "determine" the question of "… whether the previous decision to refuse asylum and protection should be upheld" we would point out that this was <u>not</u> a proper function of the decision maker in applying the paragraph 353 test. This is so irrespective of whether the "previous decision" to which the judge is referring is that of SSHD (there having been seven such decisions in total) or the FtT.

[19] In what follows in the same passage the judge was evidently troubled by the material passages in the impugned decision:

> "I have checked all seven previous decisions on further submissions in this case and they all use the same wording. I remain puzzled as to why this wording has gained the currency it has."

The judge continues:

> "If these words were the only test referred to there would be a more compelling reason to quash a decision, but in this case the decision maker has repeatedly referred to an objective anxious scrutiny prognosis of realistic prospects of success before a new tribunal. It is therefore more likely that the sentence reflects a genuinely additional observation that the Home Office has <u>in any event</u> not changed its mind."

This passage is not easily reconciled with what one finds at the beginning of para [48](vi), namely the unambiguous characterisation of the impugned text as a "misdirection". At para [49] the judge continues:

> "I do not find that it is sufficient to constitute a material error of law when read with the rest of the decision and the underlying evidence."

This, properly analysed, is the judge's <u>third</u> characterisation of the offending text. It differs from the first and second, namely (a) an unqualified misdirection in law and (b) a mere observation. This third characterisation is that of an error of law which is not material.

[20] These are three different characterisations. It would appear that, ultimately, the judge favoured the third, namely an error of law which he did not consider material. There is nothing doctrinally objectionable in this concept. The judge was stating, in substance, that an acknowledged misdirection in law was sufficiently redeemed, or counterbalanced. The basis of this analysis was "the rest of the decision and the underlying evidence". What were the features of the rest of the decision and the underlying evidence supporting this analysis? There is no accompanying reasoning or elaboration.

[21] This conclusion is preceded by six specific considerations, or reasons. These were: the FtT's decision, the submissions and the supporting evidence in *JM4* were not available to him; the challenge in *JM4* succeeded "because of an accumulation of reasons but primarily because of the court's concerns about compliance with the best interests of the children duty as governed by section 55 of the Borders, Citizenship and Immigration Act 2009"; there were more express references to the anxious scrutiny principle in the present decision than in the *JM4* case; (in substance) parts of

the impugned decision contained no misdirection in law; and, finally, the absence of any reference to the lower standard of proof in asylum cases was of no concern.

[22] Our analysis of each of these reasons is the following:

(i) We consider that the unavailability of the tribunal decision, the applicant's submissions and the underlying evidence in the *JM4* case was a matter of little moment. The crucial factor was the identical language used in the two letters of decision under scrutiny. The evaluation of this factor required an abstract, clinical exercise which could properly be undertaken without the surrounding evidential materials in the *JM4* case.

(ii) We disagree with the judge's assessment that the quashing order in *JM4* was based "primarily" on the court's reservations about the children's best interests issue. The judge's analysis is confounded by the court's withering condemnation of the legal misdirection in para [19], the detailed preceding analysis and its "balancing everything" approach in para [27].

(iii) We consider that, in substance, there is <u>no</u> material distinction between the treatment of the anxious scrutiny principle in the two cases. The decision in the present case contains but one material reference to anxious scrutiny. While this phrase can also be found in two other passages, these are unrelated to the paragraph 353 decision making exercise. Furthermore, one of them appears in the context of an article 8 European Convention on Human Rights (ECHR) assessment which (a) has nothing to do with the two new further submissions advanced by the appellant and (b) does not require an anxious scrutiny prism in any event.

(iv) We concur with the judge's fourth reason.

(v) We consider that the absence of any acknowledgement, express or implied, of the lower standard of proof in asylum cases is a factor which must be balanced in the exercise of evaluating the decision letter as a whole.

(vi) We have addressed this issue in para [20] above.

[23] The first question raised by the first ground of appeal is, in substance, whether the present case is on all fours with *JM4*. The answer is "no". We consider the judge's analysis that the quashing order in that case was based on a series of vitiating factors to be correct. The question of whether the result would have been the same if the sole legal defect had been the misdirection in law noted above is a

purely hypothetical one. The judgment speaks for itself. The extent of our disagreement with the judge on this issue is outlined in para [22](ii) above.

[24] Finally, we return to the decision letter. As our view of the decided cases makes clear, the first task for the decision maker in a paragraph 353 case is to determine whether the "further submissions" are "significantly different from the material that has previously been considered" in the sense that they have "not already been considered". If the further submissions do not satisfy this test the exercise is at an end. Mr O'Donoghue submitted that the decision maker failed to formulate, and then apply, this test. We consider that, properly and fairly construed, in that section of the decision letter beginning "You claim that you will be killed if returned to Somalia and that your father has been murdered by militia forces" the decision maker, in recognising that these two submissions had "not previously been considered", was applying the correct test.

[25] However, this passage – a crucial one – is confused. At the outset it appears to contain an acknowledgement that these are two new submissions. However, in a later part of the same passage, the decision maker states unequivocally that the appellant's claim that he would be killed in the event of returning to Somalia "has been previously considered" in the context of the Secretary of State's evaluation of <u>seven</u> previous submissions, adding "… you have submitted no new evidence to substantiate your contention". It follows that this passage as a whole does not withstand the requisite juridical scrutiny. In short, the correct test was not properly applied. This error also infects the concluding passages in the decision letter reproduced in para [10] above.

[26] In paragraph 353 cases both the decision maker and the deciding court must have to the forefront of their respective minds the very specific terms of the governing legal test, the intrinsically appalling nature of the treatment proscribed by articles 2 and 3 ECHR and the overarching standard of anxious scrutiny: see for example *Re Chudron* [2019] NICA 9 at para [5], *Re Zhang* [2017] NIQB 92 at paras [5]–[6] and *JM4*, at paras [14]–[15]. There is no margin for error. There is simply too much at stake for the third country national. This approach explains why the in bonam partem lens is not appropriate and the court must undertake a penetrating examination of the text of the impugned decision: see *JM4* at paragraphs [16] and [19].

[27] The judge did not express himself in these terms or in comparable terms. Rather the main exercise which he carried out was one of determining whether the decision in *JM4* could be distinguished from the present case. In respectful disagreement with the judge and giving effect to our analysis above we conclude that the impugned decision of SSHD is vitiated by a failure to correctly apply the first of the tests enshrined in paragraph 353 of the Rules, coupled with a material self-misdirection in law in purporting to formulate and apply the second test.

[28] While two further grounds of appeal were formally formulated, belonging to the "medical grounds" section of the first instance judgment, these were not pursued in the event. We would add that in our view the judge's consideration and determination of these issues is unimpeachable.

Conclusion

[29] For the reasons given the appeal succeeds. Subject to further argument the appropriate disposal would appear to be an order quashing the impugned decision, thereby requiring the Secretary of State to undertake and complete a new decisionmaking process in accordance with the judgment of this court.