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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 07/02/19*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SONAM TSERING CHUDRON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

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Before: Deeny LJ and McCloskey J

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McCloskey J (delivering the judgment of the court)

Introduction

[1] This is the judgment of the court to which both members have contributed, compiled following the appeal hearing conducted on 30 January 2019.

[2] The impugned decision underlying the judicial review application of Sonam Tsering Chudron (hereinafter "*the Applicant*") is that of the Secretary of State for the Home Department (hereinafter "*the Respondent*") dated 05 March 2018. By this decision, made within the framework of paragraph 353 of the Immigration Rules ("*the Rules*"), the Respondent concluded that the "*further submissions*" of the Applicant did not amount to a "*fresh claim*". The ultimate question for this court is whether, scrutinised through the prism of the governing principles, the impugned decision is infected by any identifiable error of law. Keegan J, at first instance, found it was not so infected, granting leave to apply for judicial review and dismissing the challenge substantively. This court announced its agreement with the learned judge at the conclusion of the hearing conducted on 30 January 2019. In what follows we set forth, in succinct terms, our central reasons for thus deciding.

The Decision Under Paragraph 353, Immigration Rules

[3] Paragraph 353 of the Rules provides:

> "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 When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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.
>
> 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.
>
> **Exceptional Circumstances**
>
> 353B. Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant's:
>
> (i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;
>
> (ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of

temporary admission or immigration bail where applicable;

(iii) length of time spent in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused; in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate. This paragraph does not apply to submissions made overseas. This paragraph does not apply where the person is liable to deportation."

The impugned decision of the Respondent ends with the following omnibus conclusion:

> "*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, that this could result in a decision to grant you asylum* [or] *humanitarian protection … for the reasons set out above.*"

Governing Principles

[4] The legal principles governing decisions made under paragraph 353 of the Rules have been settled for some time by Court of Appeal authority. They were considered in HZ v Secretary of State for the Home Department [2017] NIQB 92, which contains the following passage at [6]:

> "*From the authorities I distil the following principles:*
>
> *(i) while the test is that of Wednesbury irrationality, there is a significant qualification, or calibration, namely that in this context the legal barometer of irrationality is that of anxious scrutiny.*
>
> *(ii) A reviewing court must pose the two questions formulated in [11] of WM.*
>
> *(iii) A reviewing court is not necessarily precluded from applying other recognised kindred public law tests. This is reinforced by the dominance and import of the anxious scrutiny criterion.*

(iv) The Secretary of State is perfectly entitled to form a view of the merits of the material put forward: however, this is a mere starting point, since the exercise differs markedly from one in which the Secretary of State makes up his (or her) own mind.

(v) The overarching test is that of anxious scrutiny."

[5] In short, in cases of this *genre* the standard of review is that of Wednesbury irrationality applied through the lens of anxious scrutiny. This lens derives from the pernicious nature of persecution in all of the forms proscribed by the 1950 Convention, coupled with the notorious fact that the consequences of exposure to persecution can include torture, inhuman treatment and, in the most extreme cases, loss of life. These sobering realities also explain the so – called "lower" standard of proof applicable to asylum claims.

Relevant History

[6] As the "*further submissions*" phraseology of paragraph 353 of the Rules makes clear, those such as this Applicant formulate and put forward an asylum and/or human rights claim in circumstances where an earlier such claim has been rejected. In the particular context of this Applicant, the history prior to the making of the impugned decision had the following stand out features: initial entry to the United Kingdom in May 2010; return to India followed by further sojourns in India, Nepal and again India, on and between unspecified dates (per his witness statement); the acquisition of a visitor's visa authorising entry to the United Kingdom, subject to the restrictions and conditions of the visa (of which there was no evidence); a second entry to the United Kingdom on 10 September 2010; a further sojourn in the United Kingdom between unspecified dates; onward travel to the Republic of Ireland where the Applicant lived for a couple of months; travel to Belfast on an unspecified date; and the registration of a claim for asylum in Belfast on 22 November 2011 following a sojourn of unspecified proportions in this part of the United Kingdom. While the date of 22 November 2011 is taken from the Applicant's witness statement, it is clear from other evidence that the year should be 2010.

[7] The Applicant's asylum claim was refused by the Respondent by a written decision dated 24 February 2011. Some eight years later the Applicant is still litigating about the same subject matter. This is explained by the scheme of the Rules and events during the intervening period. These, in brief compass, were marked by an appeal to the First-tier Tribunal ("*FtT*"); the dismissal of this appeal; and, thereafter, a protracted period of some six years duration during which the Applicant made "*further submissions*" which the Respondent rejected under paragraph 353 of the Rules, a process which was repeated on three further occasions. This culminated in the presentation of yet another set of "*further submissions*" (the fifth) stimulating the impugned decision and these resulting judicial review proceedings. In this way the Applicant has resided in the United Kingdom during most of the period, slightly in excess of eight years, which has elapsed since his re-entry in September 2010.

Decision of the First – tier Tribunal

[8] The treatment which the Applicant alleges he suffered at the hands of the Chinese authorities would, if established to the requisite standard of proof, qualify him for the grant of refugee status as it would amount to persecution on one of the grounds proscribed by the refugee convention, namely political opinion. However the difficulty which the Applicant has encountered from the outset and at the multiple successive stages noted above is that his claim has been considered not worthy of belief. This is neatly encapsulated in the following passage from the decision of the FtT promulgated on 31 August 2011, at [19] – [21], in material part:

> "*I am aware that in these cases adverse findings of credibility should not be made lightly and that there is no requirement of corroboration …*
>
> *This case turns on credibility …*
>
> *I have considered carefully all the evidence … having done so my conclusion is that part of the Appellant's account is credible but that that part in relation to his alleged detention by the authorities is not credible.*"

[9] In the decision of the FtT this is followed by a series of specific findings. The judge's main findings were that the Applicant is a citizen of Tibet, brought up in the Derge area where he worked as a herdsman and also taught some English to village children; by May 2007 (then aged 20 years) he had moved to India; there he secured an Indian identification certificate, dated 04 May 2007; he was a monk living at a named institution until circa May 2010; and he deployed this certificate, in tandem with the other extensive documentary proofs required, for the purpose of securing the aforementioned UK visitor's visa. Based on these principal findings, the judge, logically and inevitably, rejected the central tenet of the Applicant's case, namely his allegation of detention and ill treatment by agents of the Chinese authorities in Autumn 2008: this, the judge held, was not possible as he had been settled in India from at latest mid-2007 –

> "*It follows that as I am satisfied that the Appellant had moved to India in mid-2007 that his account in relation to being ill-treated in the Derge area* [Tibet] *in autumn 2008 is not credible and is in my view a fabrication designed to bring him within the Conventions.*"

The judge similarly rejected the Appellant's assertion that he had continued to live in Tibet until early 2009 when he left for Nepal, spending a year there followed by travel to India by bus in July 2009 and the compilation of his visa application.

[10] The factors which the FtT judge found to be particularly adverse to the Applicant's case were his failure to claim asylum upon initial arrival in the United Kingdom in May 2010, his voluntary return to India and Nepal for a period of some months thereafter and the delay of almost three months in claiming asylum following his subsequent re-entry to the United Kingdom, in circumstances where, as the judge observed at [32]:

> "*The Appellant has maintained throughout that he wanted to flee from India because he was concerned that he would be repatriated to Tibet and handed over to the Chinese authorities.*"

This claim, the judge held, was manifestly irreconcilable with the alleged sequence of events just noted. The judge further found the Applicant's credibility to have been severely dented by his failure to mention anything bearing on his allegations, not made until a later stage, of detention, prolonged interrogations and multiple beatings involving kicking, slapping, repeated punches and blows with sticks, lasting as a minimum some ten days (as alleged in his witness statement).

[11] It is unnecessary to expand further on the decision of the FtT, which we find impressive in every respect. It is well structured, suitably detailed and manifestly the product of careful attention and reflection on the part of the judge. It has the further virtue of clearly formulated findings and supporting reasons. The judge's assessment that the Appellant's case was credible in certain respects but not worthy of belief in its key respects is beyond reproach. Furthermore, the scrutiny which the judge brought to bear in the exercise of determining the appeal is exemplified by her disagreement with certain discrete aspects of the Respondent's initial asylum refusal decision: see [24] – [26].

The Devaseelan Principle

[12] While the foregoing forms one of many noteworthy components of the decision of the FtT in 2011, it has the further consequence that, as noted in the impugned decision, the exercise of evaluating the immediately preceding "*further submissions*" of the Applicant engaged the well-known "Devaseelan" principle, a convenient label deriving from the reported decision of Devaseelan v SSHD [2003] Imm AR 1. The contours of this principle are neatly outlined in MacDonald's Immigration Law and Practice (9th Edition) Volume 1 at paragraph 20.120:

> "*The Devaseelan guidelines state that matters arising since the first appellate decision, and facts that were not relevant to the issues before the first immigration judge or panel, can be determined by the second. However the first determination is generally to be regarded by the second immigration judge or panel as an authoritative determination of the issues of fact that were before the first appellate body. Generally, the second immigration judge*

> *or panel should not revisit findings of fact made by the first on the basis of evidence that was available to the appellant at the time of the first hearing.*"

The authors then summarise the circumstances in which the findings of an earlier immigration tribunal can be reopened. In the context of a case – the present one – where there is but a single tribunal decision all references to the "*second immigration judge or panel*" apply to the Home Office Case Worker determining a "*further submissions*" application, i.e. the present case.

[13] The court specifically raised with Mr Erik Peters, counsel for the Applicant, the Devaseelan issue. We did not identify anything in counsel's replying submissions which would warrant any modification or dilution of, much less any departure from, the carefully structured and formulated findings of the FtT. In passing we would add that this principle was, correctly, prayed in aid by the decision maker at the outset of the impugned decision.

Consideration

[14] The court invited Mr Peters to formulate in specific and concrete terms his critique of the impugned decision. In response he pointed to the passage in the text summarising the FtT's credibility findings adverse to the Applicant. Considered fairly and *in bonam partem* and in the full context of what is a lengthy decision we can identify nothing objectionable in this passage. Mr Peters then sought to criticise the next ensuing passage in the impugned decision wherein the decision maker rejected the contention that the Applicant could not be safely repatriated to India. The specific criticism formulated was that this assessment was unsustainable having regard to the decision of the Upper Tribunal in TG (Interaction of Directives and Rules) [2016] UKUT 00374 (IAC). This has the status of a formally reported decision. It clearly secured this status, as the title and brief head note indicate, on the basis of holding that the interpretation of paragraph 334 of the Rules is subject to the Qualification Directive and the Procedures Directive: see particularly paragraphs [30] and [32] – [33].

[15] It is correct that the decision maker did not advert to TG. Had he done so we consider that he would have learned nothing, given the foregoing analysis. Nor, in our estimation, would the decision maker have learned anything material from the intensely fact sensitive context in which the Upper Tribunal, remaking the decision of the FtT, (having earlier found an error of law) allowed the appeal. The factual matrix included acceptance of the Appellant's unequivocal assertions that he had committed extensive documentary fraud in India, a specific finding that the Appellant had been living unlawfully in India for some 11 years prior to entering the UK and the acceptance of expert opinion evidence that given these factors the Indian Embassy would not provide the Appellant with an identity certificate, with the result that in the event of forcible return to India the Appellant's re-admission there

would be rejected giving rise (it would seem) to his likely onward transfer to China where, on the basis of the Respondent's concession, he would be at risk of persecution on the ground of political belief. This was the decision of what was, in effect, a first instance tribunal which weighed the evidence of the Appellant's expert and preferred this to the competing evidence on which the Respondent was relying: see particularly [34] – [36]. The expert's evidence was compiled for the sole purpose of TG's appeal and, appropriately, had a careful focus on his individual circumstances.

[16] The Upper Tribunal, in preferring the expert's evidence to the competing evidence, observed at [34] that the latter –

> "*… focuses in the main on the treatment of Tibetans who have legal residence in India.*"

This passage must be considered in conjunction with what the Upper Tribunal stated in [36]:

> "*We accept that the* [competing evidence] *does show that in general undocumented Tibetans are not deported and those without valid* [Registration Certificates] *in general face arrest and fines.*"

As submitted in the skeleton argument of Mr Philip Henry of counsel, on behalf of the Respondent, this passage, having regard to the findings of the FtT, applies fully to the Appellant's case and, we would add, confounds it. Finally, as Mr Henry submitted, TG is not a case to which the "Country Guidance" kitemark has been applied by the Upper Tribunal. This specific designation occurs subject to the conditions and only in accordance with the requirements of the relevant protocol of the Upper Tribunal.

[17] In short, if the decision maker had considered the decision of the Upper Tribunal in TG the correct analysis would have been as set forth above and the outcome would have been one of confounding the Applicant's "*further submissions*".

[18] The final limb of the Applicant's case rests on the following passage in his "*further submissions*":

> "*The Applicant's brother and cousin can come to the UK to give evidence and legal aid assistance is being sought to fund DNA testing to conclusively prove that the two brothers are related.*"

In the preceding passages there is no mention of the Applicant's cousin. There are vague and undeveloped references to the Applicant's brother who, it was said, had successfully claimed asylum in France. One interposes at this juncture the

observation that neither the Applicant's cousin nor his brother features in the Applicant's detailed statement of evidence dated 28 July 2011 and the "*further submissions*" did not include any additional statement of evidence.

[19] The terms in which the decision maker addressed this discrete issue are unremarkable. This issue was not developed on behalf of the Applicant in either written argument (with the exception of a bare, fleeting reference to the aforementioned assertion, quoted in [17] above) or in oral argument. Notwithstanding, we turn our attention to the core of how Keegan J dealt with this at first instance. This is found at [16](i):

> "*… the real issue is that there is no evidence as to how this information would affect this particular applicant's claim for asylum.*"

The judge concurred with the submission of Mr Henry, repeated in his skeleton argument before this court, that there was "*… no evidence as to what this* [evidence] *would be and how their testimony would assist the Applicant*". We endorse this assessment without reservation. Elaboration is unnecessary.

Conclusion and Order

[20] We would summarise our conclusions in a single omnibus sentence. The findings of the First – tier Tribunal in 2011 are unimpeachable, there is no discernible error of law in the later impugned decision of the Respondent and it follows that the decision of Keegan J is beyond reproach. While we consider that the Applicant was fortunate to secure the grant of leave to apply for judicial review from the judge, we view this as a reflection of the anxious judicial scrutiny which must be brought to bear in all cases of this kind and we respect the discretion available to the judge, also bearing in mind the absence of any cross – appeal on this issue.

[21] As stated in our brief oral ruling at the conclusion of the hearing on 30 January 2019 we affirm the decision of Keegan J in all respects, dismiss the appeal on its merits, award the Respondent its costs not to be enforced without further order of the appropriate court and order taxation of the Applicant's costs as an assisted person.