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No: 2019/2102/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JM4 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

McCloskey J

Introduction

[1] The Applicant, a citizen of Zimbabwe aged 35 years, challenges a decision of the Respondent ("SSHD") dated 8 October 2018 whereby it was determined that his further submissions in the wake of an unsuccessful asylum and human rights claim and ensuing dismissal of his tribunal appeal did not constitute a fresh claim, within the framework of and giving effect to paragraph 353 of the Immigration Rules.

[2] There are three principal grounds, as pleaded. The first is illegality, constituted by an asserted failure to formulate and apply the correct legal test. The second asserts breaches of Articles 2 and 3 ECHR, contrary to section 6 of the Human Rights Act 1998. The third asserts breaches of SSHD's duties under section 55 BCIA 2009. The court granted leave to apply for judicial review on the papers by its order dated 8 January 2019. The first and third grounds occupied centre stage at the substantive hearing (on 08 May 2019).

The History

[3] The relevant history is, in brief compass, the following:

(a) The Applicant claims to have entered the United Kingdom in December 2013, having travelled to Dublin from South Africa using a false passport.

(b) His subsequent asylum application was refused on 1 August 2014.

(c) His ensuing appeal to the First-tier Tribunal ("FtT") was dismissed on 12 March 2015.

(d) Following unsuccessful applications for permission to appeal to the Upper Tribunal, he became 'appeal rights exhausted' on 31 July 2015.

(e) On 10 July 2017 the Applicant made the further submissions to SSHD giving rise to the decision impugned in these proceedings.

[4] Paragraph 353 of the Immigration 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 When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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."

[5] As appears from the decision of the FtT the Applicant is married and there are three children of the family now aged 8, 11 and 15 years respectively. All five members of the family unit reside together. All are Zimbabwean nationals. From the evidence, the parents have been separated for at least two years and a certain paternal role in the lives of the children has continued.

[6] The Applicant's unsuccessful claim for asylum had two basic elements, each linked to the Zimbabwean political party "Movement for Democratic Change" ("MDC"). Persecution on the ground of a person's political belief is one of the recognised Refugee Convention grounds. In brief summary, the Applicant claimed that he had suffered, and was still at risk of suffering, persecution on account of his involvement in the MDC. He further asserted (vaguely, it must be said) that his

father, an MDC member, had been shot and killed by State agents on account thereof. He also claimed to have been told that his life was at risk immediately prior to fleeing Zimbabwe.

[7] The Applicant asserts that having flown from South Africa to Dublin the family travelled directly by train to Belfast, promptly claiming asylum. This was the impetus for a conventional interview conducted by a SSHD official. The Applicant made the following noteworthy claims and assertions during his interview:

(a) His father worked in the gold mines. "… there was always issues between him and police as they would come and beat him."

(b) His response to the question "Are you involved in politics in Zimbabwe?" was "No."

(c) "The police hit my father. They also beat him in 2004 but I don't know why … I think it was to do with gold. In 2004 I was beaten by them …"

(d) Further police ill-treatment of the Applicant and his spouse in 2007 and at "every harvest time" was alleged.

(e) As the perpetrators were police agents, to have complained to the police would have been futile.

(f) An old man told him that "they" had killed his father and would kill him also.

(g) He knew most of the inhabitants of his village, but did not know the old man.

(h) The old man said nothing about who had killed the Applicant's father.

(i) His father gave a loudspeaker to a MDC supporter for electioneering purposes and was beaten up the following day. The Applicant described this as "another thing" in response to the question: "Was his father murdered because it was known that he possessed some gold?"

The Impugned Decision

[8] In the asylum refusal letter, dated 1 August 2014, the following is the first of the reasons proffered for rejecting the claim:

> "Consideration has been given to the fact that if your father had lent a loudspeaker to the MDC it could be seen as anti-regime and that this could then be imputed to you. However, it is considered that this link would be

> tenuous and it is not considered credible that this political opinion would be imputed to you."

In the remaining passages the decision maker identified six specific elements of the Applicant's story and dismantled each *seriatim*, explaining why each of them was considered to be unworthy of belief. Finally, in the alternative, the decision maker considered that the internal relocation within Zimbabwe of the Applicant's family would be feasible. The claims under Articles 2 and 3 ECHR and for humanitarian protection were also refused.

[9] In the impugned decision dated 8 October 2018, the SSHD decision maker identified the novel aspects of the Applicant's further submissions. These consisted of four items of documentary evidence: a MDC letter, a MDC membership card, a police report and a copy death certificate. The decision notes:

> "You claim that these documents support your previous claim to fear persecution on return to Zimbabwe due to your imputed political opinion."

Having subjected each of the documents to relatively detailed forensic scrutiny, the decision maker expressed scepticism about their authenticity, concluding that "… *little weight should be attached to these documents.*"

[10] The decision maker also gave separate consideration to the best interests of the Applicant's children, stating:

> "It is considered that all three of your children are young enough to adapt back to life in Zimbabwe. Given their young ages, it is not considered that they would have yet formed ties outside the family such as would make their departure from the UK unduly harsh. It is not considered that their relocation to Zimbabwe would have any significant impact on their well-being. All three of your children have previously lived in Zimbabwe. It is considered that it would be in the best interests of your children to remain with you and return to Zimbabwe with you and your wife."

[11] A later passage of the decision letter begins with the following:

> "**Exceptional Circumstances**
>
> We have considered whether there are exceptional circumstances in your case which would render refusal a breach of Article 8 of the ECHR because it would result in unjustifiably harsh consequences for you, a relevant child

> or another family. In so doing we have taken into account the best interests of any relevant child as a primary consideration."

The conclusion which followed was this:

> "Based on the information you have provided we have decided that there are no such exceptional circumstances in your case that would warrant a grant of leave to remain outside the Immigration Rules."

Next, the decision maker noted that the Applicant's spouse was pursuing a separate asylum claim in her own right and on behalf of the three children. There are two references (only) to the children's lives and circumstances in the text which follows:

> "They attend for homework and activities when available at the premises of the NICRAS organisation (where the parents volunteered) and they are regular attenders at the weekly children's activities at a named church."

[12] The decision maker then conducted a familiar assessment: the children's ties with the United Kingdom were limited; English is their first language and the language of Zimbabwe; they would be capable of becoming accustomed to the Zimbabwe education system; they have spent much time in their country of origin; and they would be familiar with Zimbabwean culture.

FtT Decision

[13] In dismissing the Applicant's ensuing appeal the FtT, in substance, endorsed the reasoning of the SSHD decision maker and found the Applicant's story to be vague, sparse in detail and inconsistent in certain other respects. A single illustration suffices:

> "The Appellant's contradictory and at times incoherent account of who exactly he claims was persecuting his father and his own family is lacking in credibility."

The decision contains a series of specific adverse credibility findings. It is appropriate to add that this occurred in the context of the application of the so-called "lower" standard of proof engaged in every asylum case.

Governing Legal Principles

[14] The Applicant's further representations to SSHD engaged two fundamental legal rules. First, the decision maker was obliged to examine them with anxious scrutiny. The governing principles, well settled, were distilled succinctly in the

decision of this court in *HZ v The Secretary of State for the Home Department* [2017] NIQB 92 at [6]. 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 i.e. 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. See also *Re Zhang's Application* [2017] NIQB 92 at [5]-[6].

[15] The approach for the court is, therefore, that of high level Wednesbury review. The rationale for this approach is quite straightforward. If the decision maker errs in rejecting the representations made the Applicant is thereby exposed to the risk of suffering serious ill treatment in his country of origin and, in the most extreme cases, death. See *Re Chudron* [2019] NICA 9, at [5].

Analysis

[16] Does the impugned decision satisfy the legal requirement of anxious scrutiny? The answer to this question in every case will invariably involve the court in a penetrating examination of the text of the decision. This is required because, as *WM (DRC)* makes clear, the court must evaluate the challenge through the prism of anxious scrutiny. Other material evidence will also, of course, be considered. This will include the representations made to SSHD, where available.

[17] In the present case, the Applicant based his fresh representations on the "new documents" noted in [9] above (only one component of which – the "police report" – is included in the assembled evidence). There was also a letter from the NICRAS organisation and a short report from the mother's general medical practitioner. Finally, there was a witness statement signed by the Applicant. Bizarrely, this contained a comprehensive account of alleged difficulties the family had encountered in Northern Ireland, while saying nothing about the alleged persecution, past or apprehended, and, even more strikingly, containing nothing about the new documentary evidence said to emanate from Zimbabwe: in particular how, when and in what circumstances this had been procured and why it had not been provided previously.

[18] Applying the foregoing principles, I consider that SSHD's decision maker examined the Applicant's further submissions with the degree of rigour required by the anxious scrutiny principle. This is confirmed by the decision maker's correct identification of the materials which were new and the careful and detailed analysis to which the key new materials, namely those said to have emanated from

Zimbabwe, were subjected. It is not for this court, also applying the standard of anxious scrutiny, to second guess this assessment of the decision maker. The requisite degree of assiduous care has been demonstrated in this instance.

[19] However, at this juncture, it is necessary to reproduce a critical passage in the decision letter:

> *"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 (sic) this could result in a decision to grant you asylum …*
>
> *I have decided that the decision of 01/08/14 upheld by the Immigration Judge on 21/03/15 should not be reversed."*

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 in substance 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.

[20] I turn briefly to the second of the two fundamental legal rules which the Applicant's further representations engaged. This is the requirement in Section 55(3) of the Borders, Citizenship and Immigration Act 2009 that the decision maker "must" have regard to the statutory guidance promulgated by SSHD under Section 55(1). Section 55(3) has been considered in a series of decisions of the Upper Tribunal, the Northern Ireland High Court and, most recently, the Northern Ireland Court of Appeal in *JG v Secretary of State for the Home Department* [2019] NICA 27 at [19] - [35].

[21] The question for this court, as it was in *JG* and the cases cited therein, is whether the clearly demonstrated failure of SSHD to perform the duty imposed by Section 55(3) has the effect in law of vitiating the impugned decision. Mr Timothy Jebb (of counsel) on behalf of the Applicant, submits that the breach is plainly material and links this to the contention that the decision maker failed to examine, and identify, the best interests of the children involved.

[22] The riposte of Mr Aidan Sands (of counsel) on behalf of SSHD drew attention to the consideration given to the children's best interests in the original asylum refusal decision, together with the absence of any mention of the children in the Applicant's further representations. Mr Sands also highlighted what I have addressed at [17] of this judgment, while questioning whether the Applicant had been candid with the court regarding the parental relationship breakdown and the way in which the mother's asylum claim, still undetermined, had evolved.

[23] I have not found this issue easy to resolve. As set out in *JG*, the main area of enquiry for the court is whether compliance with Section 55(3) could have brought about a decision favourable to the Applicant. The court must also consider whether non-compliance with Section 55(3) has resulted in a failure to first identify, and then examine and balance, the best interests of the affected children. Furthermore, where more than one child is involved and the impugned decision makes no attempt to examine the lives and circumstances of the children individually, this too will be a touchstone for the court in determining whether the breach of Section 55(3) is material to the extent that the discretionary grant of a public law remedy is appropriate. The court will also take into account that one of the virtues of Section 55(3) is to provide protection to children whose needs and interests have been, for whatever reason, neglected in the immigration/asylum claims and applications made by either parent or both. Finally, where the children have no separate legal representation – a typical scenario in judicial review challenges and statutory appeals of this *genre* – the court will be alert to this factor not least because it leaves them exposed and serves to magnify their vulnerability.

[24] 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.

[25] For the reasons given I conclude, on balance, that the Applicant's second basic ground of challenge is also established.

Conclusion

[26] The application for judicial review succeeds for the reasons given. The Applicant has not been candid with the court: see [24] above. The involvement of different legal representatives at earlier stages might provide a partial explanation. But a stern warning as to the future is warranted. I must also be mindful of the court's assessment in [24] above.

[27] Balancing everything, the exercise of the court's discretion to grant a remedy is appropriate and the most suitable remedy is an order quashing the impugned decision of the Secretary of State. This will trigger a public law obligation to make a fresh decision, taking into account such further representations and evidence, if any, as may be provided on behalf of the Applicant and guided by this judgment. The Respondent will pay the Applicant's costs, to be taxed in default of agreement. The Order will further recite the customary provision to reflect the Applicant's legally assisted status.