Neutral Citation No: [2024] NIKB 94 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SCO12525** *ICOS No:* **23/035974** *Delivered:* **15/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY 'JR300'
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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Tim Jebb (instructed by JMS Solicitors) for the Applicant
Joseph Kennedy (instructed by the Crown Solicitor's Office) for the Respondent

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SCOFFIELD J

Introduction

[1] The applicant's challenge in the present case is against a decision of the Secretary of State for the Home Department (SSHD), made on 8 February 2023, whereby she rejected the further submissions made in support of the applicant's asylum claim and concluded that they did not amount to a fresh claim with a realistic prospect of success, pursuant to para 353 of the Immigration Rules. The questions for the court are essentially whether or not the SSHD applied the correct test in assessing the further submissions and whether anxious scrutiny was given to the new material.

[2] Mr Jebb appeared for the applicant and Mr Kennedy appeared for the respondent. I am grateful to both counsel for their helpful written and oral submissions.

Factual background

Procedural history

[3] The applicant is a Zimbabwean national who maintains that she has a well-founded fear of persecution in Zimbabwe on account of her perceived membership of, or support for, the political group the Movement for Democratic Change (MDC). She arrived in the United Kingdom on 8 March 2019 on a Visitor Visa and claimed asylum on 18 November 2019. The respondent refused the claim for asylum on 24 January 2020.

[4] The applicant appealed this decision to the First-tier Tribunal (FtT). Her appeal was dismissed by Immigration Judge Gillespie on 7 July 2021, and she became 'appeals rights exhausted' on 12 October 2022, following a refusal of leave to appeal to the Upper Tribunal.

[5] On 27 October 2022, the applicant made further submissions in support of her asylum claim. These submissions were rejected by the respondent on 8 February 2023 in such a manner as to preclude the applicant from exercising a further right of appeal to the FtT. That is the decision impugned in these proceedings. One month later, pre-action correspondence was issued to the respondent and judicial review proceedings were later lodged on 2 May 2023. Leave to apply for judicial review was granted on the papers on 16 May 2023.

The applicant's claim

[6] The applicant avers that she began to be targeted by the Zimbabwean authorities in 2014 on account of her involvement with an anti-government newspaper called Zim Mail. Her activity extended to writing fashion and beauty articles for the publication, which she claims brought her to the attention of the authorities, who suspected her of being a member of the MDC. Additionally, the applicant travelled to the UK on a number of occasions since 2014 to visit family there. As a result, she claims that the Zimbabwean authorities suspected her of being an anti-government spy and carrying information to members of the MDC in the UK. The applicant maintains that she has no involvement with the political group and that she has mistakenly been identified as a member by the authorities. Nonetheless, she believes that she will be persecuted by reason of this association and relies upon a number of previous events as evidence of this.

[7] In her affidavit, the applicant explains that between 2014 and 2019 she was arrested and questioned by the Zimbabwean police on several occasions because of her perceived opposition to the government. In particular she records that, on 16 anuary 2019, she was arrested and taken to a local police station where she was beaten by two male police officers, forced to confess to her involvement in protests against the government and subsequently raped. She was then charged with the

offence of disorderly or riotous conduct and left in a cell overnight. The following day the applicant's father was able to obtain her release from prison.

[8] Upon release the applicant attended hospital. In her written statement she mentions that she was primarily concerned that she may have contracted an STD or become pregnant as a result of the rape. The applicant was initially unable to receive treatment and was advised by a doctor to obtain an official referral from the police before he could treat her. The applicant explains that this was due to the doctor's fear that he would be punished for assisting someone involved in anti-government protests. In order to receive a police referral and avail of medical treatment, the applicant therefore gave a false account to the police of how her injuries were sustained. The applicant told the police that she was raped by an unknown male in her home on the night of the 16 January 2019. She was then referred to the hospital by the police where she was examined and treated.

[9] The applicant has also explained that, as a result of her coerced confession, she was due to appear at court on 20 March 2019 but instead fled to the UK, arriving on 8 March 2019. She spent the following eight months in the UK but, on the date she was due to fly back home, she was informed via phone call that her family house had been burned down, allegedly by the police, who had come looking for her with an arrest warrant.

The applicant's original documentary evidence

[10] The original evidence submitted in support of the applicant's claim – discussed in further detail below – was as follows:

(a) One article from the March 2015 edition of Zim Mail;

(b) Medical documents in the form of scanned copies of a Request for a Medical Report ("the medical request form"); a Report Form for Alleged Sexual Abuse and Rape Cases ("the report form"); and a Medical Report in the form of an affidavit ("the medical report");

(c) Court documents consisting of a summons requiring the applicant to attend Harare Magistrate's Court on 20 March 2019 and also an arrest warrant issued on the same day; and

(d) Photographs of her burned-down house (to demonstrate that the incident was the result of an arson attack perpetrated by the police and directed against the applicant because of her perceived membership of the MDC).

[11] The applicant originally relied upon one article from a March 2015 edition of the newspaper, in which she writes under a pseudonym. The applicant claimed that this and her later blogging on Facebook proved that she had a significant online profile and corroborated her identity as a fashion writer.

[12] The medical request form was completed by the Zimbabwe Republic Police on 17 January 2019 at 23:40. It instructed the Duty Sister of Parirenyatha Hospital to arrange for the applicant to be examined by a medical practitioner and to complete a Report Form for Alleged Sexual Offences. The request records that the applicant made an allegation of rape by an unknown male in her homestead. It also mentions that the applicant sustained some bruises on her neck, hands and thighs as a result of trying to resist the abuse.

[13] The report form was completed on 19 January 2019 by a Dr Thimoty Moyo. The medical examination made several findings. First, it notes that the applicant presented as traumatised. Second, it found that the applicant had conjunctivitis and ecchymosis (skin discolouration caused by internal bleeding). The doctor made several other observations about the applicant's physical appearance, which are not entirely legible, but which also do not appear relevant to the alleged rape and assault. Third, it found no obvious evidence of external injury to genitalia or of penetration.

[14] The medical report may give rise to some confusion. It appears to have been written on 17 January 2019, which is consistent with the date of the alleged rape and abuse. However, it records that the applicant was examined by "M. Torai" on 16 July 2019 at "11:30hrs", and that the applicant was found to have suffered several severe injuries, including a "soft tissue injury" and a "head injury".

[15] The applicant also produced a set of court documents comprising of a summons requiring her to attend Harare Magistrates' Court on 20 March 2019 to answer a charge of disorderly conduct in a public place.

The decision of the FtT

[16] Considering all the evidence, Immigration Judge Gillespie dismissed the applicant's appeal against the SSHD's refusal of her claim on the following grounds:

(i) He considered that there was insufficient evidence to suggest that the applicant's opinion articles on beauty and fashion and her social media activity would attract adverse interest from the authorities. The applicant gave no credible evidence as to why she was the subject of periodic attention.

(ii) It was inconsistent that the Zimbabwean authorities would allow the applicant to freely travel back and forth to the UK if she was suspected of being a political spy, as she contended.

(iii) The claim that she was questioned by the authorities prior to her arrest on 16 January 2019 was, in Judge Gillespie's view, "fabricated" in order to provide context and to support her claim that she was already known to the authorities.

(iv) Her account of what happened during her arrest and detention on 16 January 2019 did not "have the ring of truth." Judge Gillespie further did not accept that she would compromise the truth by later lying about it to the authorities for the sake of getting medical treatment and found her account of how she obtained release the following day to be implausible.

(v) The documentary evidence produced by the applicant in relation to the medical report and the court summons was unreliable. In particular, the medical report contained similar handwriting to the police request for examination and obvious spelling mistakes of medical names. Moreover, there was no proof of the doctor's identity.

(vi) Similarly, Judge Gillespie observed that the court documents did not contain a full postal address for the Harare Magistrate's Court.

(vii) Judge Gillespie did not find it credible that the authorities would wait for eight months to elapse before seeking to enforce the criminal charge against the applicant with an arrest warrant. He also found her account that she received the arrest warrant to be contradictory.

(viii) There was insufficient evidence to suggest that the applicant's family home was burnt down in an arson attack by the police and the photographs provided by her showed that "it was the result of an ordinary house fire."

(ix) Her account of events was not corroborated by her father or any family member, who were clearly alive to the fact that the applicant was seeking asylum in the UK.

(x) The applicant was unable to explain why she delayed fleeing from Zimbabwe following the date of the alleged rape on 16 January 2019 until 7 March 2019. Given the fact that she possessed a UK visitor visa she could have left at any time during that period. Similarly, she advanced no explanation for why she delayed making an asylum claim until 18 November 2019 during the period when she was resident in the UK.

(xi) Judge Gillespie considered the background evidence demonstrating that there was significant unrest in Zimbabwe in January 2019 but concluded that, in light of the many infirmities in her evidence, the applicant's account of events could not be proved.

[17] From the above summary it can be seen that Immigration Judge Gillespie struggled to find any aspect of the applicant's account as credible. This prompted the applicant to adduce further evidence to reinforce her claim, which gave rise to the further decision which has been impugned in these proceedings.

The applicant's further submissions

[18] On 27 October 2022, the applicant made further submissions in support of her asylum claim to the respondent. These submissions were essentially in the form of additional documentary evidence which the applicant adduced to respond to the FtT's concern that her account was not credible. The further submissions included the following documents (which, again, are each discussed in further detail below):

(a) City of Harare Fire Brigade Report dated 4 September 2019;

(b) Zimbabwe Republic Police Report dated 6 September 2019;

(c) A letter from the Health Service Board dated 20 July 2021;

(d) Copies of Facebook pages;

(e) Copy of Twitter and WhatsApp exchanges;

(f) Copies of tweets showing court documents similar to those previously relied upon by the applicant;

(g) Emails between the applicant and her solicitor;

(h) Emails and messages between the applicant and her father; and

(i) Various pieces of country-specific information.

[19] The Fire Brigade report and police report state that on 4 September 2019 the fire brigade was called to the house of a named individual (the applicant's father) to respond to an incident, the cause of which was "unknown". The applicant sought to rely on this evidence to demonstrate the truthfulness of her claim that her family home was subject to an arson attack by state authorities.

[20] The letter from the Health Service Board of 20 July 2021 explains that the applicant visited Parirenyatwa Hospital on 17 January 2019 and was admitted until 19 January 2019. The letter confirms that a medical examination was conducted, and a report form filled out by Dr Thimothy Moyo.

[21] The Facebook pages were submitted to support the applicant's claim that she had a significant online profile and to address the issue identified by Immigration Judge Gillespie that only one piece of evidence had been provided demonstrating this.

[22] As to the Twitter and WhatsApp exchanges, the applicant appears to have been notified that her photo was posted without her consent on an anti-government page entitled "#ZanuPFMustGo." The tweet provided by the applicant from

January 2022 shows an online exchange where the applicant requested that her photo be removed from the anti-government page, to which the applicant stated she had no affiliation.

[23] The second group of tweets are screenshots of official court documents issued from the Harare Magistrates' Court which also (like the document previously relied upon by the applicant) do not contain a specific return address and show similar custom stamp imprints to the one contained on the applicant's court summons. This was designed to show that the document previously supplied by the applicant should not be viewed as unusual or suspicious.

[24] In an exchange between the applicant and her solicitor dated 27 October 2022 (the day the further submissions were lodged) the applicant forwarded documents to her solicitor, which were sent to her via email by her father's assistant on 9 December 2021. In a follow-up email, the applicant's solicitor, Ms Priscilla Udoh, acknowledged receipt of the email and reminded the applicant to "bring the original envelope as proof of postage is required." This does not appear to have been produced.

[25] Additional email and message exchanges between the applicant and her father were submitted to show how the applicant was able to obtain the new documentary evidence. The first exchange reveals that the applicant was sent scanned PDFs by her father of the letter from the Zimbabwe Republic Police and also the letter from the Health Service Board on 22 July 2021 via WhatsApp. An email from the applicant's father, dated 27 October 2022, explains that he posted original documents to the applicant. No original documentary evidence appears to have been provided with the applicant's further submissions; only scanned copies were lodged. The issue of which precise documents the applicant's father was referring to is muddied further by a WhatsApp message, on the same day, where her father states that:

> "I never had hard copies of your documents, they were sent to my email which I deleted after sending … to you as I don't want any trace leading back to me in case I receive any backlash regarding your troubles. I thought you meant the other documents I had which … cost me close to usd100 to send to you. I can't afford sending you anything else with the way things are here now. So make it work if you can."

[26] Finally, the applicant also provided various pieces of country-specific information. This included an article from Vanguard Africa Foundation entitled 'Lawfare in Zimbabwe attacks on the political opposition ramping up' dated 25 August 2022; and two Human Rights Watch reports referencing events in 2020 and 2021 of alleged human rights abuses and violent crackdowns on political opposition.

[27] The applicant's further submissions were rejected by the respondent on 9 February 2023.

Relevant statutory provisions and authorities

[28] Para 353 of the Immigration Rules states as follows:

> "When a human rights or asylum claim has been refused 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."

[29] As both the applicant and respondent have identified, there is a significant amount of case-law relating to the application of para 353 of the Immigration Rules. In this jurisdiction, Colton J helpfully summarised the relevant principles in the case of *Huang v SSHD* [2023] NIKB 73, as follows:

> "[16] In brief these principles are as follows:
>
> (i) The first task for the proposed respondent is to determine whether the fresh materials are "significantly different" to the materials submitted previously. If not, the proposed respondent need go no further. If, however, the proposed respondent accepts that the material is "significantly different", it must then determine whether the fresh material creates a realistic prospect of success in a further asylum claim. The second judgment will involve not only judging the reliability of the fresh material but judging the outcome of tribunal proceedings assessing that material.
>
> (ii) The test that the judicial review court should apply is one of irrationality, namely that a decision will be irrational if it is not taken based on "anxious scrutiny.

(iii) The question is not whether the proposed respondent believes that the new claim is a good one, or should succeed, but rather whether there is a realistic prospect of the immigration judge finding that the appellant would be exposed to a risk of persecution in light of the materials.

(iv) The views of the proposed respondent are relevant but are only a "starting point" in the consideration of this question.

(v) The judicial review court must be satisfied that the proposed respondent has satisfied the requirements of "anxious scrutiny" and if it is not so satisfied, it will grant the application for judicial review.

[17] McCloskey J distilled the following principles from the case of *WM (DRC)* [2006] EWCA Civ 1495 in his decision in *Zhang* [2017] NIQB 92, which were subsequently approved by the Court of Appeal in *Chudron* [2019] NICA 9:

"(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."

[18] Finally, as Friedman J noted the authorities state that in asylum claims a "realistic prospect of success" in this

> context means "no more than a fanciful prospect of success."

[30] The final paragraph in the above citation should perhaps read that, in this context, a realistic prospect of success means no more than one which is *more than fanciful* (see, for instance, para [5] of *Zhang* (supra)). The two questions in para [11] of Buxton LJ's decision in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 – which the authorities (noted above) indicate that a reviewing court must pose – are formulated as follows:

> "First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point for that enquiry; but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Secondly, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative, it will have to grant an application for review of the Secretary of State's decision."

[31] Accordingly, even if the court is satisfied that anxious scrutiny has been applied to the evidence, it does not automatically follow that the impugned decision will be lawful; the decision maker must also identify and apply the correct test in determining whether the further submissions should be treated as a fresh claim.

[32] My attention was also drawn to para [6] of the *WM* judgment:

> "… 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."

[33] Accordingly, in assessing further submissions under para 353, the SSHD is entitled to take into account previous determinations in relation to the original claim and documents originally provided in support of it. In this connection, it is also important to bear in mind the principles set out in *Devaseelan v Secretary of State for the Home Department* [2002] UKIAT 702; [2003] Imm AR 1 ("*Devaseelan*"). These constitute an additional source of guidance for the decision-maker where a claim has previously been considered by an earlier adjudicator. They were summarised by Rose LJ in *SSHD v BK (Afghanistan)* [2019] EWCA Civ 1358, at para [32], as follows (with the most relevant for present purposes being principles (1), (4), (6) and (7)):

> "(1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
>
> (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
>
> (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
>
> (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.
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> (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
>
> (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings

in line with that determination rather than allowing the matter to be re-litigated.

(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.

(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case."

[34] Although the relevant tests and legal principles are well-established, the correct approach required of the decision-maker in the particular circumstances of any individual case can be elusive. For instance, in *JM4* [2019] NIQB 61, McCloskey J conducted a forensic analysis of the text of the impugned decision in that case, concluding at para [19] as follows:

> "Given the legal standards in play, there is no real scope for the restrained "in bonam partem" approach to this key passage. As *WM (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."

[35] Notably, McCloskey J found that the SSHD had "examined the applicant's further submissions with the degree of rigour required by the anxious scrutiny principle" which was 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" (para [18]). However, he also found a "patent misdirection" in the use of a particular phrase, namely the decision-making purporting to decide that the prior decision of the SSHD upheld by an immigration judge "should not be reversed." That particular self-direction was considered by McCloskey J to form no part of the enquiry required by para 353 of the Immigration Rules.

[36] That same issue (*viz* the extent to which consideration of whether the previous decision to refuse asylum should be upheld can be said to amount to a misdirection of law) was returned to by McCloskey LJ in the decision of the Court of Appeal in this jurisdiction (McCloskey LJ, Horner LJ and Colton J) in *Mahmud v SSHD (No 2)* [2023] NICA 80. For present purposes, the relevant issue before the court was whether the High Court had erred in finding that there had been no material misdirection in law given the fact that the text of the impugned decision suffered from the same defect as was apparent in *Re JM4*. In *Mahmud*, the wording in the decision letter was as follows:

> "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."

[37] In the High Court, Friedman J had not taken strong issue with the decision maker purporting to "determine" the question of "… whether the previous decision to refuse asylum and protection should be upheld." Analysing previous decisions on further submissions, Friedman J noted that this tended to be a standard conclusion of the Home Office. He reasoned that, if these identified words had been the only test referred to, there would be a more compelling reason to quash the decision. However, in his view the decision-maker had repeatedly referred (correctly) to an objective anxious scrutiny prognosis of realistic prospects of success

before a new tribunal. It was therefore more likely that the additional sentence (which had been criticised by the court in *JM4*) simply reflected a genuinely additional observation that the Home Office had, *in any event,* not changed its mind. Thus, for Friedman J the inclusion of that wording indicating a particular misdirection as to the proper test under para 353 did not give rise to a material error of law when the totality of the decision letter reflected a conscientious effort to apply anxious scrutiny to the evidence.

[38] Notwithstanding Friedman J's careful analysis of this issue, in the Court of Appeal in *Mahmud* it was held that the offending passage in the decision letter was a material error of law in applying the requisite para 353 analysis and, so, an adequate basis upon which the SSHD's decision should be set aside (see paras [17]-[22] and [27] of the Court of Appeal judgment). The court, elaborating on the underlying rationale behind its approach, added the following observations at para [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]."

[39] It follows from the foregoing analysis that the court is required to conduct a rigorous review of the text of the impugned decision. While the decision-maker must pose himself or herself the correct questions, it is not enough simply to state the correct test which is to be applied: the court must be satisfied that the substance of the decision reveals that the decision-maker assessed whether there is a realistic prospect of an adjudicator, applying anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return. The focus should be on a future application of that test, rather than whether a previous adjudicator's decision should be upheld or overturned. The decision-maker's own view is a starting point only; and previous determinations can be considered, in line with the *Devaseelan* principles (which are most relevant in the context of additional materials which could and should have been provided by the applicant at an earlier stage), but not such as to avoid giving anxious scrutiny to the key assessment of whether the new submissions create a realistic prospect of success.

Summary of the parties' submissions

[40] The core of the applicant's challenge is that the respondent's failure to correctly apply para 353 of the Immigration Rules, which resulted in her further submissions being rejected, was an unlawful act under section 6(1) of the Human Rights Act 1998 and in breach of articles 2 and 3 of the ECHR. The second aspect of the applicant's challenge is that the impugned decision was irrational as the respondent failed to properly take into account that the evidence provided in her further submissions established her account as credible. There is an overarching plea that the respondent failed to comply with para 353 of the Immigration Rules.

[41] On the first limb of the para 353 test, namely that the material must not have been previously considered by the adjudicator, Mr Jebb argued that the fresh documentary evidence undoubtedly overcomes this initial hurdle. He underlined that the evidence was provided in order to address some of the key concerns and findings of the immigration judge which had led to the dismissal of the applicant's claim on the grounds of lack of credibility. Mr Kennedy argued that the threshold for the first limb of the para 353 test was not so easily met, since (in his submission) the applicant was relying on material which added nothing to her original claim and was essentially repetitious.

[42] In relation to the second limb (whether the fresh material creates a realistic prospect of success), Mr Jebb relied upon the low threshold applicable to asylum proceedings and that the applicant must demonstrate no more than a prospect of success which was more than fanciful. The core of his submission on this issue was that the respondent applied too high a test and sought to find reasons to reject the evidence, rather than applying the deliberately low evidential threshold. In this way, she had failed to apply anxious scrutiny, he submitted.

[43] Mr Kennedy replied that the respondent examined the further submissions through the lens of anxious scrutiny and came to the correct conclusion that the further submissions did not present a realistic prospect of success. In particular, Mr Kennedy stressed that the further submissions did not demonstrate how the applicant was brought to the attention of the authorities on account of her suggested membership or association with the MDC; nor did they establish her as credible. Mr Kennedy relied on the *Devaseelan* principles, particularly in respect of treating any new evidence not produced with the original claim "with the greatest circumspection." In light of this he advanced the position that the applicant failed to provide a "very good reason" as to how the new evidence was obtained and why she had failed to adduce this evidence at the time of the original claim.

The impugned decision

[44] Before analysing whether the respondent adopted the correct approach in its consideration of the applicant's further submissions, it is necessary to summarise the relevant findings on the part of the respondent. The respondent began by

summarising the judgment of Immigration Judge Gillespie and pointed out that the applicant was found by Judge Gillespie to lack credibility and to have "fabricated" certain aspects of her claim.

[45] The respondent next addressed the "new submissions not previously considered" by the FtT and whether they "create a realistic prospect of success" that an immigration judge would find the applicant at risk of persecution on account of her perceived membership of the MDC.

[46] Dealing first with further documents showing exchanges between the applicant on the one hand and her father and solicitor on the other, relating to her obtaining further documentary evidence, the respondent was not satisfied that these exchanges revealed any information about how the applicant's father obtained the additional evidence and "why it cost him 100USD to post the documents." The respondent further pointed out that proof of postage of any of the original documents claimed to have been obtained by the applicant did not appear to have been submitted in support of her claim.

[47] In relation to the additional Facebook posts provided, the respondent considered that it was not explained how the additional photographs of the applicant's Facebook profile and posts could be perceived as being in support of the MDC, and they therefore added "little weight" to her claim. Similarly, it was not accepted that an online exchange via Twitter where the applicant requested that her photo be removed from an anti-government page entitled "#ZanuPFMustGo" in January 2022, would be likely to attract the attention of the authorities.

[48] The respondent reviewed the letter from the Health Service Board together with the medical documents previously submitted by the applicant. It was noted that the report number on the letter was consistent with the number on the medical report itself. However, the SSHD concluded that the letter supplied by the hospital was undermined by the following issues. First, it did not go into detail as to what exact medical procedure was conducted. Second, it did not state how the writer was aware that a medical procedure had been performed on that day, for example by reviewing their records, or whether the author was simply shown the report form or the request for a medical report. Third, there was no proof that the medical documents were official documents. Fourth, the documents were not originals, and the applicant provided no explanation as to how the documents were obtained. It was also noted that the immigration judge had found her to lack credibility and rejected the applicant's account of events. The letter also did not deal with the fact that the applicant's primary concern was that she might have become pregnant or contracted an STD. In view of these matters, it was concluded that the information provided "does not overturn the IJ's finding that you would compromise the truth of what happened on 16 January, by lying about it even for the sake of getting medical treatment." Taking all these factors into account, the respondent concluded that little weight could be attached to the letter from the Health Service Board.

[49] On the issue of the court summons, the respondent observed that none of the examples of court documents provided by the applicant through photographs of tweets were court summonses. It was noted that the stamp on one document matched the stamp on the applicant's court summons insofar as it had the same PO Box address. However, the respondent was not satisfied that the tweets of the court documents provided a full postal address for the Harare Magistrates' Court. The decision-maker concluded, "[I]t is not considered that the tweets and documents are sufficient to overturn the IJ's findings."

[50] On the alleged arson attack, the respondent found that the fact that the Harare Fire Brigade Report and the Police Report stated the cause of the fire as "unknown" did "not reveal the cause of the fire." Further, "it is not accepted that you have overturned the IJ's finding [that] little weight be attached to the photographs previously submitted, nor that the IJ considered the photographs show it was as a result of an ordinary house fire and not an arson attack."

[51] The respondent went on to consider the various pieces of country information and reports which the applicant sought to rely upon to demonstrate the dangerous circumstances to which she would be exposed should she be returned to Zimbabwe. Little weight was afforded to these documents as they did not demonstrate how the applicant herself was in danger and that her risk of persecution was as a result of her actual or perceived support of the MDC.

[52] The respondent concluded:

> "Considering the evidence in the round, including the lack of detail and specificity in your account, including little weight be attached to the Facebook Page and Tweets …, the letter from the Health Service Board, the fire service report, and the letter from Zimbabwe Police, it is not accepted that you would be considered an actual, or perceived member or supporter, of MDC. Further, it is not accepted that you have demonstrated that you would have received interest from the authorities, nor have you satisfactorily dealt with adverse findings as to how you received the arrest warrant, or how in fact your father secured your release, nor have you provided sufficient detail to overturn the finding that the statement as to the events said to occurred on 16 January 2019 had been overwritten, which he considered [did not have] the ring of truth."

[53] In a concluding refusal paragraph which appears to relate to the article 8 ECHR aspect of the applicant's claim, the respondent stated as follows:

> "Careful consideration has been given to whether your submissions amount to a fresh claim. Although your submissions have been subjected to anxious scrutiny, it is not accepted that they would have the realistic prospect of success before an Immigration judge in light of the reasons set out above, in particular:
>
> - It is not accepted that your rights under Article 8 of the ECHR would be breached …"

[54] Finally, on the last page of the impugned decision letter, the respondent expressed the following:

> "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, Humanitarian Protection, limited permission to stay on the basis of your family and/or private life or Discretionary permission for the reasons set out above.
>
> I have decided that the decision of 20 January 2020 upheld by the Immigration Judge on 7 July 2021 should not be reversed."

Consideration

First limb: Are the submissions significantly different from material previously considered?

[55] In the court's view, new documentary evidence produced by the applicant which was not previously considered by the first adjudicator is capable of satisfying the first limb of the para 353 test. In *R (AK (Sri Lanka)) v SSHD* [2009] EWCA Civ 447, the English Court of Appeal considered the proper construction of para 353. At para [26] the court stated:

> "Clearly, no particular form is required in which new material to be put before the Secretary of State has to be cast. And such new material may assert a human rights or asylum claim in a different category from what was claimed the first time (for example, a claim under ECHR Article 3 where only Article 8 had been earlier advanced, or a claim based on fear of religious persecution where

> political persecution had been advanced before). Or the same category of claim may be persisted in, but new facts asserted to support it."

[56] In this respect, I accept that the respondent applied the correct test and appropriately found that the evidence contained within the further submissions had not been addressed previously. This is clear from the way in which the decision distinguishes between the submissions previously considered and the new submissions, dealing with the latter in a separate section. Although, in argument in these proceedings, it was suggested that the new documents were simply repetitious such as to be incapable of amounting to significantly different material, I reject that argument. They were directed to the same issues as had previously been considered but were clearly designed to plug gaps in the evidential picture which had been identified by the immigration judge. In this way, they added detail which had not previously been considered and which had been invited by the immigration judge's findings. It is in my view clear that they were sufficiently different to pass the initial threshold for para 353 submissions.

Second limb: Did the respondent pose the correct question?

[57] As *WM (DRC*) makes clear, the court must also satisfy itself that the SSHD asked the correct question. It was incumbent upon the decision-maker to pose the question of whether there was a realistic prospect of a tribunal, applying anxious scrutiny, concluding that the applicant would be exposed to a real risk of persecution on return to Zimbabwe. A further relevant consideration, arising from the discussion of the case-law referred to above, is that the respondent should not assume the task of deciding whether the further submissions are sufficient to overturn the findings of the immigration judge as this is an additional gloss on the correct test. Where the decision-maker does so, this will be a misdirection in relation to the para 353 exercise and, applying the approach of the Court of Appeal in *Mahmud*, is likely to be a material misdirection.

[58] In the present case, there is evidence of the respondent stating the correct test, reaching the conclusion that the new submissions "do not create a realistic prospect of success". The concluding paragraphs clarify that this assessment is forward-looking insofar as it is not accepted that an immigration judge, considering the further submissions, *would* grant asylum.

[59] However, the substance of the decision reveals that it suffers from the same misdirection of law identified in *JM4* (as underscored by the Court of Appeal's decision in *Mahmud*, which is binding upon me). This is demonstrated by the fact that the impugned decision refers to 'overturning' the previous immigration judge's findings on some five occasions, including in a separate paragraph on the final page of the decision (with the latter alone being sufficient to result in a finding of material misdirection in law in accordance with *JM4* and in the Court of Appeal's decision in *Mahmud*). The issue with such a formulation is that it imports a requirement to

'overturn' a previous immigration judge's findings, which places an additional hurdle before the applicant in a context where the threshold for a fresh claim is deliberately low in order to avoid the risk of irreversible damage (see *AK (Sri Lanka) v Secretary of State for Home Department* [2009] EWCA Civ 447, at para [33]). Albeit a previous adjudicator's findings are relevant through the lens of the *Devaseelan* principles when considering the matter afresh, the *JM4* and *Mahmud* line of authority in this jurisdiction indicates that viewing the earlier decision as something which requires to be 'overturned' by the new material submitted under para 353 is to apply the wrong test.

[60] I also note the absence of any express or implicit acknowledgement of the lower standard of proof applicable in asylum cases; and that the term "anxious scrutiny" is not found anywhere within the section of the decision letter dealing with the protection-based submissions. In fact, only one reference to anxious scrutiny is made in the entire decision, which is under the respondent's assessment of the article 8 ECHR claim and therefore not directly concerned with the assessment of the new material.

[61] In these circumstances, I have concluded that the correct result is to quash the respondent's decision and to remit the matter for further consideration. Had I not been bound by authority, I might have taken the view, as Friedman J did in *Mahmud* at first instance, that the reference to whether or not the earlier decision should (or should not) "be reversed" was not a material misdirection when viewing the decision overall. However, in light of the Court of Appeal's treatment of that issue in *Mahmud* (and, in particular, its reasoning at para [22]), I do not consider that approach is open to me in the circumstances of this case, in light of the infirmities identified above. It seems to me that the respondent's para 353 determination has again been infected by a test which finds no expression in that provision and which, following the Court of Appeal, I am bound to treat as material in all of the circumstances of this case.

Anxious scrutiny

[62] In light of this conclusion, I do not strictly need to determine whether the respondent's decision in substance satisfied the requirements of anxious scrutiny. I would add, however, that I had considerable sympathy with the respondent's position in relation to a number of the points made by Mr Kennedy.

[63] In particular, there was a conscious effort on the part of the decision-maker to engage with each additional piece of evidence which had been provided by the applicant, albeit in a manner which sometimes seemed designed to find fault and foster doubt. The respondent was entitled to treat with circumspection the new evidence adduced by the applicant and to consider that a further immigration judge would do the same. It remains unclear precisely how much of this evidence was obtained and, in particular, why it was not brought forward sooner. When pressed on this issue of why the evidence was not provided at the time of the applicant's

initial claim, Mr Jebb indicated that this was due to two reasons. First, the applicant believed that the initial evidence supplied by her was sufficient to prove her case on its own. Second, she had an ongoing appeal before the FtT and therefore was barred from producing further evidence pending the outcome of that adjudication. Whilst the latter issue may be a satisfactory reason for the failure to produce evidence which only became available after the SSHD's initial decision, I find it difficult to see how the former constitutes a "very good reason" (see *Devaseelan* guideline (7)) justifying the applicant's failure to seek or provide relevant evidence at the time of her initial application.

[64] I am satisfied that the respondent sought to assess the content of the further submissions and each additional document, concluding, on the whole, that the evidence provided did not demonstrate a link to the MDC and/or that the applicant's online profile was sufficient to attract adverse interest from the authorities. The various emails, WhatsApp messages, Facebook photos and tweets, while perhaps suggesting that the applicant had a certain degree of public exposure through her status a fashion writer, do not, in my view, reveal a link to the MDC; nor that the applicant has at any point expressed opinions in support of that political group (or against the government for that matter) which would bring her to the adverse attention of the authorities in Zimbabwe.

[65] In relation to the additional police and fire reports, I also accept that the cause of the house fire as "unknown" is insufficient to create a realistic prospect of success in the applicant's protection claim. There are certainly details in those reports which are corroborative of her account. However, there is no indication from the new evidence provided that the fire was caused by an arson attack directed at the applicant's family, whether because of her involvement with the MDC or otherwise. The additional evidence on this point is essentially neutral.

[66] The most compelling aspect of the applicant's case (taken alone or in combination with other aspects of her claim) may well be the medical information she has provided in support of her account of having been raped and abused, along with the evidence suggesting that she had been summonsed to court shortly afterwards in relation to an alleged public order offence. There are a number of issues relating to the medical documents which may be thought to give rise to concerns about their credibility. However, the Health Service Board letter supports the averment that the applicant was in fact assessed and treated by a doctor in Parirenyatwa Hospital on a date that coincides with the date of the alleged rape and abuse; and it was documented that the applicant sustained serious injuries (see the medical report) and presented as "traumatised" (see report form).

[67] In light of the requirement to consider the evidence as a whole together with the new submission (see *Tanveer Ahemed IAT* [2002] UKIAT 00439 (starred)), the reconsideration which will be required as a result of this court's decision should address each of these issues afresh.

Conclusion

[68] For the reasons given above, particularly at paras [59]-[61], the application for judicial review succeeds on the ground that the decision was based on a material misdirection in applying the appropriate test under para 353 of the Immigration Rules (encapsulated within ground (v)(b) of the applicant's Order 53 statement). The decision will therefore be quashed and remitted to the respondent for further consideration.