Neutral Citation No: [2021] NIQB 98	*Ref:* QUI11658
	ICOS No:
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 02/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR 184
FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE HOME OFFICE

_____

Mr Erik Peters BL (instructed by Nelson Singleton Solicitors) for the Applicant
Mr Aidan Sands BL (instructed by the Crown Solicitor's Office) for the Respondent.

_____

QUINLIVAN J

Introduction

[1] The applicant, a citizen of Somalia, has applied for asylum in the United Kingdom. By this application she challenges a decision of the Home Office made on 30 September 2020 in which the respondent Home Office rejected the further submissions made by the applicant under paragraph 353 of the Immigration Rules. The applicant was represented by Mr Peters of counsel and the respondent by Mr Sands of counsel and I am grateful for both counsel for their helpful submissions in this matter.

Background to the Applicant's Case

[2] The applicant claimed asylum in the United Kingdom in November 2012. The applicant's first husband was killed in 2000, she married again in 2003 and states that her second husband, who is now deceased, was kidnapped by the Islamist militant group Al-Shabaab.

[2] In making her claim for asylum the applicant claimed that she herself was detained by Al-Shabaab in September 2012, having been accused of spying for the

Government, she alleged that she was beaten whilst in captivity but ultimately escaped. The applicant's claim centred around the risks posed by Al-Shabaab should she be returned to Somalia.

[3] The applicant's passage to the United Kingdom was arranged and/or paid for by her sister who resides in Saudi Arabia. As outlined above, the Applicant claimed asylum in November 2012 and this claim was rejected by the Home Office on 21 November 2014. Thereafter the applicant appealed this decision to the First tier Tribunal and her appeal was rejected on 12 March 2015. The Judge presiding over the First tier Tribunal dismissed the applicant's claim on the basis that her accounts were inconsistent and lacking in credibility.

[4] The applicant applied for permission to appeal to the Upper Tribunal and on 29 July 2019, permission to appeal was refused.

[5] On 19 April 2017 the applicant made further submissions to the Home Office, supplemented with medical evidence. The medical evidence comprised two short medicals: a GP letter dated 5 November 2015; and a letter from Belfast Home Treatment dated 21 December 2016. These medicals recorded that she was suffering from depression for which she was on prescribed medication and further recorded that she was being investigated for "suspected cognitive defect" and whilst not formally diagnosed it was stated that there was a belief that she was suffering from a "dementing process." She also suffered from osteoarthritis.

[6] Advancing her submission of April 2017 the applicant advanced the case that the "*consistency and credibility issues which clearly had a decisive effect upon the outcome of the Applicant's asylum claim/appear have likely arisen as a result of the Applicant's medical health condition*."

[7] The Home Office considered those further submissions, considering whether the applicant's vulnerability, as evidenced by the medical reports, would lead to a breach of Article 3 ECHR if she were removed and whether there was any interference with her private life under Article 8 ECHR. The Home Office concluded that the submissions did not meet the requirements of paragraph 353 of the Immigration Rules.

[8] The applicant made further submissions on 16 December 2017, these submissions attached details of attacks which had been carried out in Mogadishu by Al-Shabaab. The Home Office rejected these further submissions on 8 February 2018 and the Applicant does not rely upon them for the purpose of these proceedings.

[9] The applicant lodged a third set of further submissions on 6 April 2018. In support of her submissions the applicant lodged her GP medical notes and records which represented more comprehensive medical information than had been lodged with her first set of submissions. She further lodged a 2010 World Health Organisation report "A Situation Analysis of Mental Health in Somalia" (the "WHO

report") and a Human Rights Watch report "Chained Like Prisoners": Abuses against People with Psychosocial Disabilities in Somaliland, dated 2015 (the "Human Rights Watch report"). In summary terms these reports documented the treatment of mentally ill persons in Somalia, the detail of which will be discussed further below.

[10] The Secretary of State for the Home Department ("SSHD") rejected these submissions on 17 May 2018. The applicant sought to judicially review the Home Office decision. That application was delayed as a result of her application for legal aid being refused. Ultimately the applicant obtained leave to judicially review the Legal Services Appeal Panel from McCloskey J and thereafter legal aid was granted.

[11] Keegan J granted the applicant leave to challenge the decision and on 17 February 2020 the SSHD agreed to quash her decision and by agreement was ordered to make a fresh decision within 3 months.

[12] In fact as appears above a fresh decision was not made until 30 September 2020 and was not communicated to the applicant's solicitor until 13 October 2020.

[13] Thereafter, Scoffield J granted leave following an oral hearing on 2 February 2021 and the case came before me for hearing on 7 June 2021.

Legal Framework

[14] Rule 353 of the Immigration Rules provides as follows:

> "*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."*

[15] The first question for the decision-maker is whether there is fresh material not previously considered.

[16] The second question is whether the totality of the material, that is the new material read with the previously considered material, creates a realistic prospect of the applicant succeeding in an appeal to the First-tier Tribunal.

[17] In this context a "realistic prospect of success" means "no more than a fanciful prospect of success." *AK (Sri Lanka) v Secretary of State for Home Department* [2009] EWCA Civ 774 (§33)

[18] The legal test to be applied in judicially reviewing the legality of a decision of this kind was outlined by the English Court of Appeal in *WM (DRC) v SSHD* [2006] EWCA Civ 1495, wherein the Court stated:

> "*[10] That, however, is by no means the end of the matter. Although the issue was not pursued in detail, the court in Cakabay recognised, at p191, that in any asylum case anxious scrutiny must enter the equation: see §7 above. Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.*
>
> *[11] 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. Second, 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."*

[19] This approach has been adopted by McCloskey J in *Zhang v SSHD* [2017] NIQB 92, §5. In a subsequent decision *JM4* [2019] NIQB 61, McCloskey J stated that in considering whether the impugned decision satisfied 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.*" (§16). Going on to state that *WM (DRC)* made it clear that:

> *"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."*

[20] The reference to the lower standard of proof to be applied in the assessment of risk of persecution is a reference to the fact that the standard of proof is not the civil standard, but rather requires proof to "a reasonable degree of likelihood." *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958.

[21] The Respondent has invited the Court to have regard to the *Devaseelan* principle, referring to the judgment of Carnwath LJ in *AA (Somalia) v SSHD* [2007] EWCA Civ. 1040 wherein he provided the following summary of the principle at §53:

> *"In Devaseelan itself it was the Secretary of State who was seeking to rely on the previous decision. The applicant's claim for asylum, on the basis of feared persecution in Sri Lanka, had been rejected; but, following the coming into effect of the Human Rights Act, he made a human rights claim based on substantially the same facts. The guidelines were the tribunal's attempt to provide a consistent approach to such cases. Hooper LJ has set out the relevant passage in full. I extract what seem to me the most relevant points for present purposes (including the AIT's emphasis):*
>
> *(1) The first Adjudicator's determination should* ***always*** *be the starting-point. ….*
>
> *(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. …*
>
> *(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, 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 relitigated…*

(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…"*
*[*Emphasis in judgment of LJ Carnworth]

[22] The respondent states that this is relevant to the decision-making in the instant case given the findings of the Tribunal to the effect that the Applicant's accounts as they related to her description of the risk posed by Al-Shabaab were variously, described as "fabricated", "inconsistent and improbable."

The Applicant's further submissions

[23] As outlined above the applicant has made further submissions on three occasions. Initially she submitted two short medical reports in April 2017. These reports were relied upon in support of the proposition that the applicant was suffering from mental illness, including cognitive decline. It was submitted that the fact that the applicant had been suffering from mental ill-health had not been known to the Tribunal judge and, had it been known, it may well have influenced his assessment of her credibility. The applicant's first submission was rejected in September 2017.

[24] Thereafter the applicant submitted reports about attacks in Mogadishu in December 2017. These reports were submitted in support of a contention that she could not safely return to Mogadishu. These submissions were rejected in February 2018. The applicant does not seek to place further reliance on these reports they will not be referred to further in this judgment.

[25] Finally, in April 2018 the applicant submitted both medical evidence and, reports from WHO and Human Rights Watch.

[26] The medical evidence supplied by the applicant in support of her submissions, comprised her GP medical notes and records and included, *inter alia,* the following:

i) A report from Dr Edgar, Consultant Psychiatrist, dated 1 November 2016 which noted that she was suffering from "a moderate depressive episode, along with cognitive impairment." She was unable to make a diagnosis of dementia.

ii) Correspondence from Dr Edgar to the applicant's GP diagnosing, a moderate depressive episode and mild cognitive impairment. She noted that a recent scan was "negative for neurodegenerative dementia."

[27] The report from the World Health Organisation, in summary form, documented the cultural stigma attached to mental illnesses in Somalia and noted

that the "*mentally ill are generally chained and/or confined*" and further documented "*extreme isolation, discrimination and stigmatism, expressed through violent actions.*" The report also detailed the lack of mental health facilities in Somalia.

[28] The Human Rights Watch report also documented the chaining of persons in Somalia, when being treated for mental illness.

[29] The applicant's submissions were to the effect that:

(i) The medical evidence provided evidences the Applicant's mental health difficulties and her vulnerability.

(ii) The reports from both the World Health Organisation and Human Rights Watch provide detail about how persons suffering from mental illness are treated in Somalia. This included information that persons with mental illness are ostracised by the community, isolated and stigmatised and are sometimes kept chained. The Applicant, as a person suffering from mental ill-health was thus a person at risk of being subject to Article 3 ill-treatment.

(iii) The cultural animosity that exists towards those with mental illness would render her susceptible to suicide.

Analysis of the Impugned Decision

[30] The impugned decision was handed down by the Home Office on 30 September 2020 and was received by the Applicant on 13 October 2020. As outlined above the context in which this decision was made was that an earlier decision of 17 May 2018 (based on the same materials) had been quashed and the respondent had agreed to make a fresh decision within 3 months.

[31] In light of the authorities above a close analysis of the decision of the Secretary of State is appropriate.

[32] My primary concern relates to the Secretary of State's approach to the decision of 17 May 2018, which decision had been quashed. There are a number of references over the course of the impugned decision which suggest that the Secretary of State attached weight to the decision of 17 May 2018 treating it as if it was a decision to which she was entitled to have regard. The Secretary of State thus appears to have proceeded on the flawed assumption that the May 2018 decision was a valid decision. It was not, it had been quashed by agreement of the parties, and the Secretary of State was obliged to make an entirely <u>fresh</u> decision based upon the same materials.

[33] There are a number of aspects of the decision which illustrate this flawed approach on the part of the Secretary of State.

[34] Under the heading Submissions that have ***previously been considered*** (emphasis added) the Secretary of State listed a number of points, including *inter alia*, the following:

> - *You claim that the treatment of people with mental health problems in Somalia amounts to inhuman and degrading treatment, and therefore returning you to Somalia would breach your rights under Articles 2 and 3 of the ECHR.*

[35] However, the first occasion upon which the applicant made a claim about the circumstances which would be faced by persons suffering mental illness was in her submissions of 6 April 2018, dismissed by the Secretary of State on 17 May 2018 and thereafter quashed. There had in consequence been no previous valid consideration of that issue and the reference to the matter having been previously considered was flawed.

[36] It is appropriate at this juncture to address the reliance placed by the Secretary of State on *Devaseelan*. The Secretary of State, when referencing *Devaseelan* refers to the adjudication made by the Tribunal judge However, there is a marked difference between what was being assessed by the Tribunal judge and the matters which were the subject-matter of these submissions.

[37] The Tribunal judge had rejected the Applicant's accounts as they related to the risk posed to her by Al–Shabaab should she return to Somalia. The Tribunal Judge had also rejected the Applicant's accounts about the level of support or otherwise which she could avail of within Somalia from family members. The Tribunal judge never adjudicated upon issues around the potential treatment of the applicant in light of her mental health issues and all of the evidence about the applicant's mental health post-dates that decision.

[38] Thus, the applicant's credibility in relation to the risk posed to her by Al-Shabaab was not of direct relevance to her fresh complaint which was unrelated to a risk posed by Al-Shabaab but rather a separate and unrelated risk of ill-treatment because of her claimed mental ill-health and because of the manner in which persons with mental health issues are treated in Somalia.

[39] Furthermore, the evidence advanced on in relation to the applicant's mental health issues were not dependant on the applicant's credibility in any meaningful way, rather they were reliant on assessments made about the applicant by her GP and a Consultant Psychiatrist.

[40] In those circumstances the reliance by the Secretary of State on the *Devaseelan* principle, appears misconceived.

[41] A further aspect of the decision which leads to the conclusion that the Secretary of State failed to approach the submissions by making a *fresh* decision

relates to a passage under the heading Exceptional Circumstances, a passage further repeated under the heading Non-protection based Submissions: Other ECHR articles (Article 3 Medical),wherein it is stated:

> "*You have provided substantial medical evidence in your latest further submissions. This includes your medical records, several letters from your GP and hospital doctors/psychiatrists, and medical assessments. Based on the evidence you have submitted, it is accepted that you suffer from the conditions you have claimed.*
>
> *However,* ***it must be noted that all this medical evidence was submitted to the Home Office in your previous further submissions and was fully considered then. You have submitted no new evidence to the Home Office since April 2018 to indicate whether your conditions have improved, deteriorated or remained the same*** *during the past two years, or what treatment (if any) you currently receive."* (emphasis added)

[42] There are two aspects of the above passage which cause concern. In the first instance, the medical evidence cannot be described as having been fully considered. Inasmuch as the material was 'considered' it was 'considered' in a decision thereafter quashed. That decision had no further relevance. Secondly, it is apparent that the Secretary of State drew an adverse inference from the failure of the Applicant to supply fresh medical evidence. However, the Secretary of State had been ordered to make a fresh decision within three months. Leaving aside the delay in making that fresh decision, it was open to the Secretary of State to offer the Applicant an opportunity to submit any additional materials she might wish to have considered. Had that invitation been issued, depending upon the response, it would have been open to the Secretary of State to draw certain conclusions from the absence of new materials.

[43] However, that is not what happened in this case. The Secretary of State was directed to make a fresh decision within three months, it took her seven. The applicant was not directed to update the information provided and was entitled to proceed on the basis that the determination would be made on the basis of the materials already provided. To draw an adverse inference from the applicant's failure to submit new material was both unfair and amounted to taking into account an irrelevant consideration.

[44] I am satisfied moreover, that significant weight was attached to the applicant's failure to provide updated medical evidence as towards the end of the decision, albeit under the heading Risk of Suicide, the decision-maker concluded that it was not accepted that:

> *"the Applicant's submissions would have a realistic prospect of success before an Immigration Judge in light of the reasons set out above,* ***in particular****;*
>
> - *You have provided no recent evidence that you are currently suffering from* ***<u>any</u>*** *medical conditions."* (emphasis added)

[45] This passage lends support to my conclusion that the Secretary of State took into account an irrelevant consideration, the absence of any updated medical notes or records, and that she attached some weight to that consideration in arriving at her determination.

[46] A further issue which arises when one considers the Secretary of State's decision-making relates to the approach taken by the Secretary of State to the evidence about the ill-treatment of those suffering from mental illness in Somalia. The Secretary of State, in assessing this issue, determined that the reports which had been provided by the applicant, the World Health Organisation report and the Human Rights Watch report were somewhat out of date. The Secretary of State went on to refer to the contents of a more recent UN report from 2018 and thereafter stated:

> "*Given the improvements in the mental healthcare system in Somalia outlined above it is not accepted that you would be chained up or suffer any other inhuman or degrading treatment on return. Therefore, it is not accepted that returning you to Somalia would breach your right under Articles 2 or 3 of the ECHR."*

[47] There are two issues arising. In the first instance, while the UN Report acknowledges improvements in the mental healthcare system in Somalia, it is clear that little comfort can be taken from that report, and it does not undermine the central findings of the earlier reports which were to the effect that persons suffering from mental ill-health could be subjected to Article 3 ill-treatment. The report references a Borgen magazine report of December 2018 which notes, *inter alia* that:

> "*The WHO is currently collaborating with local medical facilities to encourage mental healthcare in low-income areas. The practice of chaining the mentally ill indicates that primary health care and mental healthcare are not being provided seriously in Somalia. With the goal of raising awareness and education, WHO's Chain-Free Initiative advocates keeping hospitals, medical institutions, homes and environments chain-free in order to support and properly those who are suffering from mental illnesses."*

[48] That the WHO is operating a *Chain-Free Initiative* gives some indication of the extent of the risks posed to the mentally ill in Somalia and the Secretary of State's decision fails to explain why, other than by reference to improvements in the mental healthcare system, which are minimal, the applicant did not face a risk of exposure to Article 3 ill-treatment.

[49] Addressing the passage outlined at §46 above, the applicant complains that the Secretary of State did not apply the correct standard of proof to the determination of this issue. I have also formed the view that the applicant's criticism is justified. As outlined above, in the assessment of risk of persecution the standard of proof is not the civil standard but requires proof to "a reasonable degree of likelihood." The language of the passage above and the succeeding passages where other aspects of the applicant's claim were dismissed do not suggest that the correct standard of proof was applied. The question the Secretary of State ought to have asked herself was whether there was a reasonable degree of likelihood that the applicant would be subject to persecution. The phraseology of the passage above and the assertion that "*it is not accepted that you would be chained up or suffer any other inhuman or degrading treatment*" does not represent the application of the correct standard.

Conclusion

[50] My primary decision therefore is that the Secretary of State has fallen into error in failing to treat the applicant's claim as a fresh claim and reconsidering it accordingly. Instead, on several occasions in the course of her decision she has betrayed a lack of understanding that the decision of May 2018 was quashed and thus did not amount to a consideration of the applicant's claim and that no reliance should have been placed upon it.

[51] I further consider that the manner in which the Secretary of State placed reliance upon *Devaseelan* was flawed. I entirely accept that the Secretary of State was entitled to have regard to the decision of the Tribunal judge and to give it the appropriate weight in accordance with the principle in *Devaseelan*. However, it appears to me that the Secretary of State has incorrectly applied that approach in this case. The Secretary of State was considering a new issue, which hadn't been advanced before the Tribunal judge. While it was legitimate to have regard to the applicant's credibility, the new material was not dependent on the applicant's credibility and spoke to an issue which the Tribunal judge had not been asked to address. The reliance upon *Devaseelan* in the manner in which it was relied amounted to a misdirection in law.

[53] I also consider that the Secretary of State fell into error in referencing the applicant's failure to adduce up to date medical evidence and the reliance which she placed on same. I am prepared to accept that it was open to the Secretary of State to invite the applicant to present additional information and that, in that context, she could have had regard to the absence of any further medical information. However,

having failed to provide the applicant with that invitation, for the Secretary of State to draw an adverse failure from the applicant's failure to do so was both unfair and amounted to her taking into account an irrelevant consideration.

[54] I am of the view that the Secretary of State, who was obliged to examine the evidence with anxious scrutiny, failed to explain how she arrived at the decision that the UN report, in any real sense undermined the concerns identified in the earlier World Health Organisation and Human Rights Watch reports. Moreover, I have concluded that she failed, in looking at this issue to apply the correct standard of review.

[55] In all the circumstances, the Secretary of State's decision is quashed. The Secretary of State must make a fresh decision. In doing so, the Secretary of State will consider any such further representations and evidence as may be provided by the applicant. The respondent will pay the applicant's costs, to be taxed in default of agreement.

Postscript

[56] When judgment was due to be handed down, a query was raised with the parties as to whether or not an application for anonymity had been made on behalf of the applicant. It transpired that no such application had been made but the applicant at that stage sought to make an application. An application for anonymity was made on 19 October 2021 relying upon the general practice of anonymising judgments in cases related to asylum seekers. The applicant referred the Court to the *First-tier Tribunal Presidential Guidance Note No 2 of 2011*; *The Upper Tribunal Guidance Note 2013 No 1: Anonymity Orders*; and a Practice Note from the English Court of Appeal.

[57] It appears that no previous application for anonymity has been made, either at the level of the First-tier Tribunal or before the High Court. I am also advised that none of the previous decisions have been published, so the applicant has not previously been identified in relation to these proceedings.

[58] Whilst the respondent initially indicated that a restricted reporting order might be a more proportionate manner of addressing this issue, no further submissions were made in reply to the applicant's submissions as summarised above.

[59] In view of the approach generally taken to anonymity applications in judgments involving asylum seekers, the rationale for which is outlined in the English Court of Appeal Practice Note which states that the court was "satisfied that the publication of the names of appellants may create avoidable risks for them in the countries from which they have come …" I am satisfied that it is appropriate to accede to an application for anonymity in this case.