Neutral Citation No: [2019] NIQB 86 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL11067** *Delivered:* **07/10/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY OMAAR ISMAIL

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT DATED 10 FEBRUARY 2018

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COLTON J

Introduction

[1] The applicant was born in Mogadishu, Somalia on 12 August 1968.

[2] He avers that he fled Somalia in December 2002 with his wife and children and travelled to Kenya. He then travelled onward to the United Kingdom alone, arriving in London on 20 January 2003. His trip to the United Kingdom was financed by his brother who then lived in Australia.

[3] The records indicate that the applicant claimed asylum at an office of the Home Office in Croydon, South London on 7 February 2003. He completed a screening interview at that time and the court has seen the record of that interview. By his own admission he did not remain for the conclusion of the process but absconded on the basis of alleged intimidation by a staff member at that office. Unsurprisingly his claim for asylum was refused. Notwithstanding his assertion in his affidavit of 11 May 2018 that he did not receive a copy of the refusal it appears that an appeal was lodged on his behalf by solicitors. He did not attend at that appeal. The appeal proceeded on 30 July 2003. The decision records:

> "*In view of the fact the appellant has failed to explain the reason for non-compliance, failed to attend the first hearing and/or failed to comply with the directions I find that this is precisely the situation which I can and will apply Rule 45(2).*"

[4] Rule 45(2) of the Immigration and Asylum Appeals (Procedure) Rules 2003 empowers the Tribunal to dismiss an appeal without a hearing.

[5] Since that time the applicant has remained in the UK and he avers that he came to Northern Ireland at the end of 2017. He has not provided any significant detail about his activities in the interim. He says as follows in his affidavit:

> *"14. After the determination I became an absconder. I have relied upon friends and charity in the United Kingdom for social support since 2003. I lived in people's homes and they provided me with things like food and clothing. In exchange I would assist them, usually by acting as an informal interpreter or teacher due to my English language skills. I was particularly helped by Mr Abdisamad Salah and Mr Said Ahmed who provided e-mails confirming their role to the Home Office.*
>
> *15. I kept my head in the sand about my irregular immigration status throughout all of these years. I was very embarrassed that I did not have status and terrified that I could be returned to Somalia. I became very anxious and have suffered from depression.*
>
> *16. I moved to Belfast at the end of 2017 as I had a friend who lived there. I knew that I needed to take steps to regularise my status. I approached a solicitor to ask for help to make a fresh application. I had been scared in London that I would have a similar experience as before. I hoped that in Belfast I would be treated more fairly because I would not meet the same Home Office staff as before."*

[6] As a consequence the applicant availed of the "further submissions" process under paragraph 353 of the Immigration Rules.

[7] Those submissions were received by the Home Office on 12 September 2017.

[8] The submissions were in the form of a detailed written submission prepared by his solicitors and were accompanied by the following additional material.

(i) Further submissions pro forma form.

(ii) E-mail from Abdisamad Salah.

(iii) E-mail from Saeed Sharif.

(iv) Letter from International Meeting Point.

(v) Letter from Red Cross.

(vi) Letter from the Welcome Organisation.

(vii) Copy screening interview transcript.

(viii) News reports on Al Shabad attacks in Mogadishu January 2017 - June 2017.

(ix) International Crisis Group, "Instruments of Pain (iii); Conflict and Famine in Somalia" 9 May 2017.

(x) Amnesty International Report - Somalia 2016/17.

(xi) Human Rights Watch, World Report - Somalia 2017.

[9] The matter was considered by the Home Office and on 10 February 2018 a further submissions decision was issued. The application was refused. The decision was accompanied by a detailed "consideration of submissions" setting out the basis for the refusal.

[10] It is this decision which is challenged in these judicial review proceedings. Leave was granted by McCloskey J on 19 June 2018. There was delay in having the matter listed because of on-going health issues in relation to the applicant. The matter was heard by me on 23 September 2019.

[11] I am obliged to counsel in this matter for their helpful focused and succinct oral and written submissions. Ms Helena Wilson appeared for the applicant and Mr Philip Henry appeared for the respondent.

The relevant law

[12] There is no dispute as to the applicable law on the issue that arises in this case.

[13] Paragraph 353 of the Immigration Rules provides as follows:

> *"When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any application relating to that claim is no longer pending, the decision-maker will consider any further submission 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;
(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

[14] The approach to be taken by decision-makers at a fresh submission stage has been set out in the judgment of the Court of Appeal in England and Wales in the case of **WM (DRC) v Secretary of State for the Home Department** [2006] EWCA Civ 1495 which has been endorsed on a number of occasions in this jurisdiction.

[15] In its judgment the Court of Appeal stated:

"[*10] … 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 para 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."

[16] The authorities were reviewed in this jurisdiction in the case of **Zhang v Secretary of State for the Home Department** [2017] NIQB 92. In his judgment McCloskey J reviews the authorities from which he distils the following principles at paragraph [6]:

> *"(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."*

The impugned decision

[17] In respect of the two tests set out in paragraph 353 the respondent considered that Part I of the test was met. Thus the decision-maker considered that there was material not previously considered and categorised that material as follows:

> (i) The applicant's claim that he has a well-founded fear of persecution on the basis of ethnicity as a Bandhabo (minority clan);
>
> (ii) The applicant's claim that he has a well-founded fear of persecution by the militant group Al Shabab.

[18] Whilst one might quibble with this categorisation of the submission made on behalf of the applicant it is clear that in considering the two questions the decision-maker has had regard to the matters raised on behalf of the applicant.

[19] The decision-maker has therefore accepted that the first test of Rule 353 has been established. That being so the case turns on consideration of the second test; whether the whole of the material available to the decision-maker creates a realistic prospect of success before a First Tier Tribunal?

[20] Again the approach to the second limb of the test is not in dispute.

[21] What is meant by a "reasonable prospect" of success has been referred to in various authorities. In **AK (Afghanistan) v SSHD** [2007] EWCA Civ 535 Toulson J said that:

> *"A case which has no reasonable prospect of success … is a case with no more than a fanciful prospect of success."*

[22] In **ZT (Kosovo)** [2009] UKHL 6 the House of Lords held that the SSHD should hold a case to have a realistic prospect of success unless it was "*clearly unfounded*". In that case Lord Carswell noted *"In order to justify its exercise the claim must be so clearly lacking in substance that it is bound to fail".*

[23] This court must ask the two questions set out paragraph [11] of **WD** and in particular in addressing the issue 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? The legal barometer of irrationality is anxious scrutiny which is the overarching test.

[24] Before further considering the decision it is also necessary to have regard to the decision in **MOJ (Returns to Mogadishu) (Somalia) (CJ)** [2014] UKUT 00442. This is of particular relevance in determining whether or not there is a real risk of the applicant being exposed to treatment contrary to Article 3 upon his return to Mogadishu. **MOJ** is a country guidance case where the Upper Tribunal sitting as the Special Immigration Appeal Court provided the judgment to be used as guidance for other judges and SSHD decision-makers dealing with cases involving similar returns to Somalia.

[25] The court was chaired by the then President Mr Justice McCloskey, now Lord Justice McCloskey. The court considered the earlier guidance cases for Somalia, other related jurisprudence and updated expert evidence so that it could provide guidance on how further cases involving returns to Somalia should be decided.

[26] Mr Henry points out that after considering the various sources of information and detail the UT concluded that conditions in Mogadishu had improved and there was no general risk of persecution or breach of Article 3 caused by returning someone to Somalia.

[27] Nonetheless the court did accept that there may be a risk to an individual.

[28] In this respect Ms Wilson points to the following passages in the judgment:

> *"(vii) A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer…*

(ix) If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:

- *circumstances in Mogadishu before departure;*
- *length of absence from Mogadishu;*
- *family or clan associations to call upon in Mogadishu;*
- *access to financial resources;*
- *prospects of securing a livelihood, whether that be employment or self-employment;*
- *availability of remittances from abroad;*
- *means of support during the time spent in the United Kingdom;*
- *why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return. …*

(xi) It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms."

[29] It is clear that a fundamental aspect of the applicant's submission is that he has no nuclear family in Mogadishu.

[30] On this issue the written submissions before the decision-makers say as follows:

"The applicant fled with his family to Nairobi, Kenya with the assistance of his brother Mahamud Ismail who was living in Sydney, Australia. He had no status in Kenya and was forced to place his family in a refugee camp. The applicant instructs that his brother then arranged for him to travel to Dubai and on to the UK. His family remained behind because his brother could not afford to pay for travel for all of them. The applicant instructs that his brother had planned to move his family out when he saved up the money, but this never happened. The applicant last had contact with his family in 2005 and his brother Mahamud died in 2007. ….

> *The applicant has no family left in Somalia and his clan is a minor one with no power or resources. Further he does not believe he would be welcomed by his clan because he is illegitimate and therefore has no place with them. The applicant has also been gone from Somalia for 15 years and has no connections remaining there. If he returned to Somalia he would be isolated and vulnerable and in danger of persecution and serious harm."*

[31] Later in these submissions it is asserted "*the applicant has no family or support network in Mogadishu"*. This assertion is again repeated towards the end of the submissions.

[32] The issue of whether or not the applicant has family in Mogadishu was clearly central to the decision made by the decision-maker.

[33] When considering the submissions in relation to the "*protection based submissions*" the decision-maker says:

> "*For this consideration your claim has been taken at its highest. This is not an acceptance of the facts in your claim, however for this consideration it has been assessed on the basis that everything you state is true."*

[34] Mr Henry points out that this in fact is not the appropriate test for a decision-maker who is entitled and indeed obliged to make some assessment of assertions made by an application in these circumstances. Nonetheless it is clear that when one examines the consideration of the submission it has not in fact been assessed on that basis. In respect of whether or not there is nuclear family support in Somalia the decision-maker has rejected the express assertion by the applicant that no such support exists.

[35] This claim is rejected in the following way:

> "*… By your own admission you have a mother and father in Somalia (screen interview).*
>
> *You have provided no evidence that you have lost contact with your family, or that you have unsuccessfully made genuine efforts to contact them.*
>
> *In the United Kingdom, people wishing to try and trace their relatives overseas can contact their local Red Cross Branch, who will discuss the situation with them. If it seems that the Red Cross might be able to help, the enquirer will be asked to fill in the relevant forms. These will be sent on to the British Red Cross Headquarters in London, from*

where they are forwarded to the appropriate Red Cross or Red Crescent National Society in another country or to the International Committee of the Red Cross (ICRC). When a relative has been successfully traced, they can once again be in contact by letter or phone. In areas of conflict or across front lines, they may need to use Red Cross messages to share their family news.

Whilst you have provided a letter from the British Red Cross to confirm that they have provided you with financial assistance during your time in the UK, there is no evidence that they have been asked to do a tracing search for your relatives. Therefore it is considered that you do in fact have connections in Somalia and avenues to re-establish contact."

[36] Then in the decision the following appears.

> *"As already considered earlier, whilst it has been noted that you have been absent from Somalia for 15 years, you have family support (parents) …"*

And later the following appears:

> "
>
> - *It is not accepted that as a minority clan member, you would be returning to Mogadishu, without clan support and without family support."*

[37] Again later in the consideration of this issue the decision-maker says:

> *"There is nothing to suggest that you would not be able to rely on either the support from your family and children (of whom you would be near or over 18 and able to support you), your parents, or the clan to which you are a member."*

[38] In the pre-action protocol letter sent on behalf of the applicant it is said:

> *"For example, the refusal letter frequently states that the applicant has parents living in Somalia, this was correct in 2003, however his parents are now deceased."*

[39] In his affidavit the applicant says at paragraph 5:

> *"… My parents died before I fled Somalia."*

[40] Mr Henry reminds the court that the decision-maker did not have before it any positive assertion that the applicant's parents had in fact died. He says that in any event this assertion should be treated with some circumspection. Their deaths were not referred to in a detailed letter of submissions prepared by a solicitor. Furthermore, there is an obvious inconsistency between the account in the PAP letter which suggests that the parents died after he had fled and not before he fled as set out in his affidavit.

[41] On the basis of the information before the decision-maker Mr Henry argues that it was perfectly reasonable to come to the conclusion that the applicant had parents in Somalia. He points out that the onus is on the applicant to ensure that all relevant information is before the decision-maker.

[42] In coming to the conclusion in respect of the applicant's parents has the respondent met the test of anxious scrutiny? The information in the screening interview was prepared in February 2003. At that time the applicant's parents were aged 61 years and 55 years approximately. In his submissions in 2018, some 15 years later, the applicant was asserting that he had no family connections left in Somalia. When making the application he would not have had access to the file of the transcript of his screening interview. Given the passage of time and given the potentially serious consequences it seems to me that applying the test of anxious scrutiny a reasonable decision-maker should have considered the possibility that in fact the applicant's parents may well have died or no longer reside in Somalia in the interim. Clearly he was not accepting that the assertion made by the applicant was true. At the very least it seems to me that the decision-maker should have sought further clarification on this issue before rejecting the applicant's assertion on this particular issue.

[43] It appears that the decision-maker's approach to the relevant factual matters which are set out in the MOJ decision specifically the death of the applicant's brother, and the availability of funds from abroad, the availability of clan protection and the presence of nuclear family in Mogadishu was to dismiss each of these factors as unsubstantiated and therefore untrue. All of these matters are classically ones to be considered in a credibility assessment conducted by a First Tier Tribunal which will have the ability to receive oral evidence from the applicant including under cross-examination from the respondent and make an assessment of the truthfulness or otherwise of the assertions made by him. However, in particular it seems to me that if it were accepted as true that the reason the applicant no longer has a nuclear family in Mogadishu is because his parents have died this may well have had a material bearing on the decision actually made. If in fact the applicant can establish that his parents are now dead then his prospects of success could not, on the reasoning of the decision-maker, be described as fanciful, clearly unfounded or clearly lacking in substance.

[44] I recognise that the decision was not made solely on the basis of the absence of a nuclear family in Mogadishu but that consideration was clearly central to the decision.

[45] I cannot therefore accept that in respect of the evaluation of the facts in his consideration the Secretary of State has satisfied the requirement of anxious scrutiny.

[46] I fully accept that this fault cannot be laid solely at the door of the decision-maker. However I consider that the interests of fairness and justice (a kindred public law test) and the requirement to ensure anxious scrutiny of an application such as this does require the respondent to consider the application in light of the assertion that the applicant's parents are deceased.

[47] I consider the appropriate remedy is an order of certiorari quashing the impugned decision of the Secretary of State. The matter should be referred back for reconsideration by a different decision-maker and remaking of the decision. In particular the decision-maker should consider the impact of the applicant's case that in fact his parents are deceased and the consequences that has for his claim. In my view this should also entail considering any further representations on behalf of the applicant. This would be preferable to the making of a decision on the narrow basis as to whether or not the applicant has a nuclear family in Somalia and the effect that might have on his prospects of success. Whilst the court has not considered the material it is clear that further information in relation to Red Cross tracing and the applicant's medical condition has been obtained. It would be artificial and inappropriate for the matter to be reconsidered solely on the basis of the nuclear family issue only for the Home Office to be faced with a further submission based on that further material.

[48] I therefore make an order of certiorari quashing the impugned decision of the Secretary of State and refer the matter back for reconsideration. The respondent will pay the applicant's costs, to be taxed in default of agreement. The applicant's costs will be taxed as an assisted person.