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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY OMAR MAHMUD FOR JUDICIAL REVIEW

Mr Frank O'Donoghue QC and Mr Robert McTernaghan BL (instructed by MacElhatton Solicitors) for the Applicant
Mr Aidan Sands BL (instructed by the Crown Solicitor's Office) for the Respondent, the Secretary of State for the Home Department

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FRIEDMAN J

INTRODUCTION

[1] In *R (BA (Nigeria) and PE (Cameroon)) v Secretary of State for the Home Department* [2009] UKSC 7[1], Lord Hope began his judgment with the following remarks:

> "The ability of asylum seekers who make unsuccessful claims to be allowed to remain to discover further reasons why they should not be removed from the country where they seek refuge is an inescapable feature of any system that is put in place to meet a State's obligations under the Geneva Convention on the Status of Refugees and Article 3 of the European Convention on Human Rights. The

> opportunity for further reasons to be put forward is enhanced by the fact that a series of decisions may need to be taken before a person's immigration status is resolved. Various measures have been put in place by the United Kingdom to deal with this phenomenon."

The applicant, Mr Omar Mahmud, has made further submissions in support of an asylum claim, which was previously refused by the Secretary of State and the refusal **remained** upheld by the First-tier Tribunal by way of a full merits appeal. Those further submissions have been rejected by the Home Office and at the same time it has exercised its power to cancel the applicant's financial and accommodation support leaving him homeless and without resort to livelihood or subsistence. The logic of such an action is that if there is no discernible legal impediment to departing the country, any adverse consequence of removing support payments are said to lie with the migrant's choice to remain, and not the State's choice to no longer subsidise his stay. This is the backdrop to a situation that befell the applicant from the summer into the winter of 2018-2019 when a set of further fresh claim submissions were rejected by the Home Office and the applicant's asylum support remained cancelled leaving him, according to his evidence and the evidence of others, to live on the street.

[A] Grounds of Judicial Review

[2] By the terms of his Order 53 Statement the applicant has leave to challenge the conduct of the respondent Secretary of State as unlawful on two grounds:

(i) Refusing the applicant's fresh application/further submissions in support of his asylum claim on the 23 August 2018; and

(ii) Refusing the applicant accommodation and ancillary support (whether pursuant to section 4 and/or 95 of the Asylum and Immigration Act 1999 or Article 3 ECHR or otherwise howsoever) pending the determination of his fresh application/further submissions made on the 23 August 2018.

[B] Overview

[3] The mere making of submissions in support of a fresh claim does not alter the status of the claimant whose legal existence and concrete situation in this country is marginal. That is because he is prohibited from establishing a livelihood, has no right to subsistence, nor right of abode. Also without the formal acknowledgement that he has a fresh claim he is at risk of being removed or required to leave immediately. To say that the applicant's situation is marginal does not mean, however, that he exists outside the protection of a legal framework. A failed asylum seeker is someone who has exhausted his formal avenues of appeal against a negative decision on his asylum claim. At that stage, and pending his removal or voluntary exit from the United Kingdom, he is entitled to make further submissions

in support of the existence of a fresh claim and the Home Office is under a duty to consider them carefully in accordance with paragraph 353 of the Immigration Rules and otherwise in conformity with public law. The requisite care in considering such submissions is derived from the consequences of their erroneous rejection, which could be death, torture and persecution. While those submissions are under consideration it is open to the claimant to apply for discretionary asylum support under section 4(2) of the Asylum and Immigration Act 1999 (the '1999 Act'). The Home Office is under a duty to provide that support in order to avoid a claimant suffering from a breach of his rights under the European Convention of Human Rights ('ECHR'), as provided for by regulation 3(2)(e) of The Immigration and Asylum (Provisions of Accommodation to Failed Asylum Seekers) Regulations 2005 (the "2005 Regulations"). This mandatory intervention arises from the special situation of the migrant who as a condition of his temporary entry into the country has "*no recourse to public funds*" such as to enable him to independently acquire shelter, food, or what Lord Bingham in one of the key authorities termed the "*most basic necessities of life.*"

[4] This applicant has made several rounds of further fresh claim submissions to the Home Office in an attempt to regularise his status. In between the rejection of his sixth and seventh set of submissions, the respondent made a decision to withdraw the applicant's accommodation and ancillary support under section 4(2) on grounds that there was now no longer any reason to avoid the consequences of the withdrawal of support as he was able to return his country of origin.

[5] The applicant then made yet further submissions in support of a fresh claim and at the same time made an application for the renewal of his under section 4(2). The Home Office refused his fresh claim submissions, but the application for renewed asylum support was not processed due to apparent technical error. The applicant then made his eighth further submission in support of a fresh claim and at the same time sought to renew his asylum support. The refusals on both fronts are the subject matter of Grounds 1 and 2, although it also appears that the asylum support application was not properly processed in so much as all of the information that was sent to the Home Office via its established channels was not taken into account.

[6] The applicant remained destitute without any right to work, with no temporary support to enable his accommodation until judicial review proceedings were issued on 25 January 2019 together with an application for interim relief. At that stage, the respondent recognised her duty to provide support to the applicant by virtue of the judicial review proceedings being brought. The application for interim relief was agreed by consent on 7 February 2019.

[C] The Issues

[7] The issues before me on Ground 1 are whether the refusal of the relevant eighth fresh claim submission was lawful on grounds of error of law and/or

rationality (termed below by me as Ground 1A). The dispute concerns both the failure in form to state the correct test under paragraph 353 of the Immigration Rules at the conclusion of the decision, based on criticisms made of the use of similar language in *In re JM4* [2019] NIQB 61, and the failure in substance to give sufficient weight to information provided both in terms of the risk on return to Somalia of being killed or tortured by Al-Shabaab and/or the medical evidence concerning mental ill-health. The challenge in relation to the medical evidence now falls to be considered by reference to the revised approach to such matters directed by the Supreme Court judgment in *AM Zimbabwe v Home Office* [2020] UKSC 17. I gave the applicant leave to argue this aspect of his pre-existing Ground 1 in a recalibrated fashion as informed by the new case law (termed below by me as Ground 1B).

[8] The issues before me on Ground 2 are if the decision to withdraw accommodation and support rendered the applicant imminently street homeless during a period where the Home Office recognised no basis for a fresh claim, whether such conduct amounted to a breach of section 4(2) and/or a breach of Article 3 ECHR for which the respondent is directly responsible. Of the various issues raised by this ground the key dispute is whether the withdrawal of asylum support after the refusal of the sixth further submissions was properly reviewed when followed up with the seventh and eighth submissions on behalf of an **claimant** who was said to be mentally vulnerable and moving between street homelessness and being at imminent risk of it.

[9] The street destitution complaint involves questions of law that I was told have not been looked at in depth in Northern Ireland, but are the subject of decided case law in England that has informed Home Office policy. Aside from the legal issues, the evidence produced to the court by both parties indicated both practical confusion and systemic problems in applying for a renewal of asylum support under section 4(2) of the 1999 Act. Even if this aspect of the claim had become academic, as submitted by the respondent that it did as a result of the applicant having his asylum support renewed once leave to bring judicial review was granted in this case, I would still have proceeded to rule on the ground for the public interest reasons identified in *R v Secretary of State for the Home Department ex parte Salem* [1999] AC 450, 456G-458A. In any event, given that the applicant was without asylum support for seven months and the respondent has denied any breach of section 4(2) and/or Article 3 ECHR, it would be wrong to regard the issues on Ground 2 as speculative or theoretical: *In Re E's Application* [2003] NIQB 39 at [9].

[D] Approach

[10] Although the Order 53 Statement was drafted as outlined in [2] above, the grounds were advanced before me at the hearing in reverse order. I have found it easier to approach the complaints in the same order as they were drafted in the pleadings and upon which leave was granted. I have done so, in part because it is the decisions concerning the eighth fresh claim submissions in August 2018 and the application for asylum support that were made in conjunction with those

submissions that are the subject of the grounds. There has been no challenge to the decision to initially withdraw support after the refusal of the sixth further submission at the end of May. Also the proceedings have brought to light questions about the inter-relationship between fresh claim submissions and asylum support and the extent to which that inter-relationship should be tolerated or prised apart. The order of the pleadings is better suited to understanding those questions in the chronological order that they arose**.**

[11] The judgment is split into the following Parts:

Part I: Asylum History - deals with (a) the applicant, (b) procedural history, (c) the First-tier Tribunal decision, (d) the succession of further fresh claim submissions, and (e) observations.

Part II: Ground 1A – Refusal of the Fresh Claim Submissions - deals with (a) legal framework, (b) the impugned decision (c) argument based on *JM4* (d) conclusions on error of leLaw, and (e) conclusions on substance.

Part III: Ground 1B – Medical Reasons Post-*AM Zimbabwe* – deals with (a) relevant facts, (b) previous domestic/ ECHR approach, (c) the Supreme Court judgment in *AM*, (d) the applicant's reframed submission, and (e) conclusions.

Part IV: Ground 2 – Withdrawal of Asylum Support - deals with (a) context, (b) legislative framework, (c) policy, (d) decided case law, (e) relevant facts, and (f) conclusions.

PART I: ASYLUM HISTORY

[A] The Applicant

[12] The applicant is a Somali national. He was born in May 1978. He claimed asylum at a screening interview in London on 14 September 2013, having admitted that he had clandestinely entered the United Kingdom via a third country on 4 September 2013. His claim has always been that if he is returned to Somalia, he will face persecution and death and/or torture from Al-Shabaab, the militia organisation that is proscribed under UK anti-terrorism law. Although some of the details of his account have developed over time, the applicant maintains that Al-Shabaab attacked both him and his family when he resided in Mogadishu and worked as a welder in a family run garage that periodically serviced government vehicles. After being kidnapped, detained and tortured, the applicant says he escaped, but Al-Shabaab came to the garage again before he could warn those who were working there. His brother was killed, his father was seriously injured by shooting, and thereafter the applicant left Somalia using a false passport. He has a mother, four siblings and a wife who remain in Somalia. There is an uncle who assisted him to travel.

[13] Since he arrived in this country the applicant has suffered from mental health and general well-being difficulties. He complained of low moods and suicidal ideation during his asylum appeal proceedings. There are multiple short update letters from a GP, Dr Enda Cullen, who has treated the applicant since 2015 when he came to live in Northern Ireland. Dr Cullen has described symptoms indicative of the applicant suffering from PTSD, but as a non-specialist GP he has not purported to diagnose an illness from a qualified position of expertise. Although there have been referrals to mental health services, no diagnostic or therapeutic contact has apparently taken place. Dr Cullen has also found the applicant to suffer from unspecified personality issues that compromise his capacity to cope with stress. The applicant himself has described to the court in his grounding affidavit a tendency to withdraw from everyone he knows, including those such as his solicitor, and charities who have sought to assist him. He attributes this to the pain and suffering that he had endured due to his destitution and his medical condition. Since at least July 2017, the applicant has been supported by his current solicitor. It is not in dispute that the applicant's father, who he says was shot by Al-Shabaab in 2013, died during 2018. The applicant was informed about the death at the beginning of July 2018, at a point that he was destitute and without fixed accommodation. That event has unsurprisingly caused him great anguish.

[B] Procedural History

[14] Having attended the screening interview on the 14 September 2013 the applicant provided a statement of evidence based on a further interview on 12 December 2014. The Home Office made its initial decision to refuse asylum on 24 January 2014. The decision of the First-tier Tribunal was handed down on 8 April 2014 by Immigration Judge Hands. The Tribunal then refused permission to appeal on 21 October 2014. Between January 2015 and December 2018 the applicant made nine further submissions in support of fresh claims (see [17] below).

[C] The First-tier Tribunal Judgment

[15] Before detailing the original Tribunal findings it is helpful to recall their essential relevance to the applicant's current situation. In the absence of a successful appeal against those findings the applicant is deemed to be a failed asylum seeker, subject only to the making of further submissions under paragraph 353 of the Immigration Rules. Paragraph 353 is set out at [19] below. It requires a claimant to demonstrate that he is in a realistic, as opposed to fanciful, position to advance a successful fresh claim. In response to such further submissions the Home Office decision maker (and any court reviewing a decision to refuse those submissions) must have regard to the original Tribunal findings to consider what in the content of the further submissions can be regarded as substantially new and what impact the fresh evidence or arguments could have on achieving a different outcome in future fresh claim proceedings. In his decision of 8 April 2014 Judge Hands found the following:

(i) The applicant's medical evidence was that he had suffered hearing loss as a result of being beaten on the head with a gun, but produced only a referral letter to an Ear, Nose and Throat Hospital. There was no reference to loss of hearing in the screening interviews, either as a result of shots being fired in the room where he was held captive, or through being beaten over the head with rifle butts. The physical ailments that were referred to by the applicant in the interview concerned pains in the legs, his testicles, his shoulder, his eyes and wrist, albeit with no reference to their causation by torture ([22] and [25]);

(ii) Although the applicant claimed that he had worked as a welder between 2008 and 2012, he could not give any detail as to what being a welder entailed ([24]);

(iii) His description of the work on government vehicles, including how the work came through a third party, and a dearth of any detail as to what was done on the cars, caused doubt that the account about the garage employment, and therefore the motive for the Al-Shabaab attack, could be believed [(25]);

(iv) The vague and evolving account of the 28 day kidnap/interrogation and torture designed to discover the whereabouts of the applicant's father and brother was also doubted. The family owned the garage, and the applicant had been kidnapped from it. Al Shabaab knew where to find them ([29]);

(v) The post-incident photographs did not prove that the brother (body covered by a shroud) had been killed, or that the father (man with no significant visible injuries) had been shot in the face, especially so as the person who was being treated by medics seen in the photograph showed only a little blood ([17(f)], [22] and [33]);

(vi) The mere fact that the applicant was kept alive for 28 days when he had no information to impart to his captors further brought into question whether the kidnap and torture had occurred ([30]);

(vii) The description of the escape from custody under fire and being injured by torture was held to be implausible ([31] and [34]);

(viii) Given that the applicant was able to make arrangements via his uncle to leave the country with false documents in a very short space of time, it was again deemed to be implausible evidence that it was impractical in the meantime to warn the father and brother that Al-Shabaab might target them ([32]);

(ix) In any event, the account of how land was sold and agents were paid to enable escape from Somalia was held to be too short to be feasible ([35]);

(x) It was concluded that the entire account had been fabricated for the purposes of the asylum claim ([37]);

(xi) On that basis it was also concluded that his return to Mogadishu, where he had lived his whole life, with family still living there, and with no actual connection to the government, meant that there was no real risk of serious harm such as to otherwise require humanitarian protection ([38]);

(xii) In respect of the applicant's claim that he was of low mood and had suicidal thoughts, there was no evidence presented to demonstrate that this was the case. In any event the complained of condition was not such that return to Somalia would be a breach of Article 3 ECHR on separate medical grounds ([40]).

[16] On 21 October 2014, permission to appeal the First-tier Tribunal decision was refused by Judge Cruthers. The applicant took issue with the credibility finding because "*he may*" be suffering from PTSD and should not have been expected to be totally consistent and accurate. By this stage the applicant was living in Belfast, having resided in the Sunderland and Leeds areas at the time of the appeal proceedings. The application was five and a half months out of time and permission for an extension was refused. The judge additionally held that there was otherwise no arguable point of law, noting that "*given the evidence it is difficult to think that any First-tier Tribunal Judge would have concluded that this appeal should have succeeded on any basis*".

[D] The Further Fresh Claim Submissions

[17] The applicant thereafter made nine fresh claim submissions that were submitted and refused between 2015 and 2018. These were:

(i) On 26 January 2015 (JMS Solicitors, Belfast) making reference to altered travel advice (refused 1 May 2015**);**

(ii) In mid-2015 (JMS Solicitors, Belfast) enclosing a GP letter from Dr Cullen [not in the disclosure] but according to the medical records describing scars on the Applicant's back due to knife wounds and PTSD symptoms, and indicating that he had been referred for specialist psychiatric assessment, although no such assessment was forthcoming (refused 15 October 2015);

(iii) On 6 April 2017 (Killen Warke Solicitors, Belfast) referring to evidence of the country situation and its implications for the PTSD diagnosis, albeit with no medical evidence (refused 11 May 2017);

(iv) On 13 July 2017 (Creighton & Co Solicitors, Belfast and Ms Elaine Stewart now acting, as she continued to do in these proceedings) regarding again the

country situation, but with no new suggestion of how it altered the applicant's personal risk (refused 6 September 2017);

(v) On 6 October 2017 (Creighton & Co) enclosing a letter from Dr Cullen apparently similar in content to the letter served in 2015; and indicating that a consultant surgeon report would follow to deal with the causation by torture of the physical injuries, but a report was not forthcoming (refused 17 January 2018);

(vi) On 13 February 2018 (Creighton & Co) again enclosing just country material with no new suggestion of how it altered the applicant's personal risk, but also referring to an awaited appointment with a consultant surgeon that again did not materialise into a report (refused 12 May 2018 which triggered the cessation of asylum support from 9 June 2018);

(vii) On 12 June 2018 (Creighton & Co) enclosing essentially the same text of the letter from Dr Cullen, as contained in the fifth submissions of 2017, but adding that there was also a potential diagnosis of "*some personality issues*" that would impede the applicant's capacity to deal with his current situation of removal from his accommodation (refused 9 August 2018);

(viii) On 23 August 2018 (Creighton & Co) enclosing Upper Tribunal decisions respectively concerning the return of single women facing internal relocation dangers and a child-minor returning without family ties and support; there were also two further letters from Dr Cullen dated 16 July 2018, confirming the great distress caused by the recent death of the applicant's father, and 14 August 2018, indicating that his current homelessness had exacerbated his mental health problems (refused 17 October 2018, received 10 December 2018);

(ix) On 13 December 2018 (MacElhatton Solicitors, Belfast, with Ms Stewart still acting) enclosing only general country material, describing the applicant as a torture victim and mentally ill, and indicating that he was awaiting an appointment with a consultant surgeon who would provide a report concerning his torture related injuries, but no report was forthcoming (superseded by the bringing of the judicial review claim).

[E] Observations

[18] As the refusal of the eighth submission filed on 23 August 2018 and refused 17 October constitutes the impugned decision, I return to its detail in Part II below. For present purposes, I make only generic observations having had the opportunity to read the underlying material of all that is summarised above:

(i) The reliance on general country material was unlikely to make a difference at any stage, because of the prevailing Article 3 ECHR position reflected in *KAB*

v Sweden, App No. 886/11, 5 September 2013, ECtHR and the country guidance detailed in *MOJ (Return to Mogadishu) Somalia* [2014] UKUT 00442 (IAC). None of the submissions ever seriously indicated a reason to depart from these authorities and their assessment that there is no existing general risk of human rights ill-treatment pertaining in Somalia.

(ii) The applicant's case either in its original form, or in any of the submissions, has not relied on either the risk of internal relocation within the country, or lack of family, clan or network support, such as to prevent his removal to Mogadishu. Both in 2013 and now, he continues to be in touch with his family.

(iii) Although Dr Cullen has briefly described physical injuries and psychiatric symptoms in letters in 2015, 2017 and 2018 he has remained entirely dependent on the applicant's account of their origins, and despite indications in various submissions that the letters would be supported by surgeon reports and psychiatric assessments, none have been forthcoming.

(iv) In so far as Dr Cullen's letters have referred to a fractured finger and stab wounds, these are both inconsistent with the previous accounts of physical ailments and injuries provided in the asylum interview and in the appeal proceedings. In particular there was no description ever of being stabbed, only beaten with a rifle butt. Contrary to the concerns of the Tribunal the applicant does suffer from hearing loss; and in fact now wears a hearing aid. However, the origins of the hearing loss remain in dispute. An additional report was served by Dr Cullen dated 7 March 2019 during the life of these proceedings, but it did not add to anything that has been said before in 2017 and 2018. I return to other features of the medical evidence below.

PART II: REFUSAL OF THE FURTHER SUBMISSIONS (Ground 1A)

[A] Legal Framework

[19] The Secretary of State's consideration of such new material that is said to ground a "fresh claim" is governed by paragraph 353 of the Immigration Rules, which provides:

> "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."

Then paragraph 353A provides:

> "Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."

[20] The importance of paragraph 353 is that where the Secretary of State determines that the further submissions do amount to a fresh claim, the subject enjoys a statutory right of appeal against the Secretary of State's substantive adverse conclusion on the merits. If she determines otherwise, there is no such right of appeal, and the decision becomes only subject to judicial review: *R (Robinson) v Secretary of State for the Home Department* [2019] UKSC 11 at [2] and [64]. The scheme has been held to strike a fair balance between ensuring that there is a right to challenge every relevant decision before a court or tribunal, without unnecessarily burdening the immigration appeals system: *R (BA(Nigeria) and PE (Cameroon)) v Secretary of State for the Home Department* [2009] UKSC 7 [at [32]; and *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338 at [22] – [24].

[21] The legal test to be applied in the judicial exercise of reviewing the legality of this specific genre of decision is well-established, having been stated in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 and adopted in this jurisdiction. Lord Justice Buxton (at [6] – [7]) first described the task of the Secretary of State under paragraph 353:

> "[6] He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material.

> 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.
>
> [7] The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as [counsel] pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay v SSHD* [1987] AC 514 at p 531F."

[22] His Lordship then set out the task of the court at the point of judicial review ([10] – [11]):

> "[10] ….Whilst … 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."

[23] In *Huang Zhang v Secretary of State for the Home Department* [2017] NIQB 92 at [6] McCloskey J (as he then was) distilled the following principles from *WM* that were thereafter adopted by the Court of Appeal in *Chudron* v *Secretary of State for the Home Department* [2019] NICA 9 (Deeny LJ and McCloskey J) at [4]:

> "(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."

[24] The Court of Appeal in *Chudron* at [12] also confirmed that the making of further submissions pursuant to paragraph 353 as in this case will engage the "Devaseelan principle" (*Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1):

> "[12] The contours of this principle are neatly outlined in MacDonald's Immigration Law and Practice (9th Edition) Volume 1 at paragraph 20.120:
>
> > "The Devaseelan guidelines state that matters arising since the first appellate decision, and facts that were not relevant to the issues before the first immigration judge or panel, can be determined by the second. However, the first determination is generally to be regarded by the second immigration judge or panel as an authoritative determination of the issues of fact that were before the first appellate body. Generally, the second immigration judge or panel should not revisit findings of fact made by the first on the basis of evidence that was available to the appellant at the time of the first hearing."

[25] McCloskey J explained that in the context of a case where there is but a single tribunal decision all references to the second immigration judge, adjudicator or panel apply to the Home Office case worker determining a "*further submissions*" application. The judgement noted at [13] with approval that the Home Office case worker had deployed a *Devaseelan* analysis in the body of his decision, and that the same exercise had been conducted by the High Court in reviewing the decision.

[26] Given the nature of the findings by the First tier Tribunal (as summarised in [15] above) and the fact that this applicant has obviously not fared well thereafter in serving evidence that has sufficed to establish a fresh claim, I found it helpful to recall the key passages of *Devaseelan*. They were recently summarised in *BK (Afghanistan) v Secretary of State for the Home Department* [2019] EWCA Civ 1358 at [32] by Lady Justice Rose:

> "(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, 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."

[27] The Home Office has produced '*Asylum and Human Rights Policy Instruction - Further Submissions*' (version 9.0 publication date: 19 February 2016) (the 'Further Submissions Policy'). The "*policy intention*" is described at [3.1]:

> "The policy objective when dealing with further submissions is to maintain a firm but fair and efficient immigration system that grants protection and/or leave to those who need it, or qualify for it, but tackles abuse and protects public funds by quickly rejecting unfounded or repeat claims. This is achieved by:
>
> - requiring protection based further submissions from failed asylum seekers to be made in person to ensure they maintain contact with the Home Office and to minimise the risk of fraud by checking their identity;
>
> - requiring further submissions on non-protection human rights grounds to be made by means of a valid application;
>
> - quickly considering whether the new evidence changes the original decision to refuse, to ensure we grant protection and/or leave to remain to those who qualify for it;
>
> - dealing quickly with unfounded claims and using immigration detention to ensure those who do not need protection and have no other right to be in the UK leave voluntarily or have their removal enforced quickly (and in the meantime cannot access financial support)."

In the introduction to section 4 of the Further Submissions Policy, it is said:

> "In all cases, where new information is provided it must be considered alongside the previous material, taking all evidence available into account. However, where further

> submissions simply repeat information that has already been considered, caseworkers should refer to the previous refusal and appeal determination in rejecting the claim – there is no need to provide detailed reasons again if the issues have already been properly considered previously."

[28] For both the Home Office reader (and thereafter the judge as reader) there is an inevitable risk of incremental scepticism about how after so many further submissions, noticeably lacking in detail and largely written in similar ways, there could ever be a genuinely fresh claim with realistic prospects of success. The Home Office policy confronts both the possibility that further submissions will demonstrate that previous decision may be wrong, but equally that the mechanism to make such submissions will be misused as a means of maintaining an irregular migrant status for as long as possible. The common law in this area has set exacting standards of anxious consideration on how to combat such scrutiny fatigue. It dates – at least – back to *Bugdaycay*. But scepticism is a problem of itself that needs to be rendered transparent and accountable so that it can be prevented from doing injustice. It remains essential to bear in mind the additional observations of the Court of Appeal in *Chudron* at [5]:

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

As to the lower standard, the authorities confirm that "*realistic prospect of success*" in this context means "*no more than a fanciful prospect of success*": *AK (Sri Lanka) v Secretary of State for Home Department* [2009] EWCA Civ 447 at [33]. The threshold for a fresh claim is deliberately low in order to avoid the risk of irreversible damage.

[B] The Impugned Decision

[29] In order to fairly assess the quality of the impugned decision, it is important to analyse the detail of the submission from the applicant that the respondent purported to lawfully refuse. In doing so, I do not discard the facts and content of the previous submissions and refusals. I cannot do that, not least, because they are referred to in the body of the impugned decision. At the same time, I bear in mind that the claim is brought with regard to a distinct decision. That is what I turn to first.

[30] The eighth submission of 23 August 2018 (summarised in the sequence at [17(viii)] above), made seven points, the first four of which concerned the applicant's destitution, and which could not have supported a fresh claim, even if they were relevant to the renewed application for section 4(2) asylum support. On behalf of the applicant Mr O'Donoghue QC accepted that this was the case, but argued that points (6) and (7) referred to new material that was significantly different from that already submitted. The relevant text of the submission reads as follows:

> "(6) I will be killed if I am returned to Somalia
>
> (7) My father has now been murdered."

[31] Read in the body of the Home Office pro-forma document that is supplied for the making of such submissions the pithy statement at point (7) made it look like the father had *recently* been murdered and that this was an entirely new event. However, the attached letter from Dr Cullen dated 16 July 2018 suggested that the death had recently occurred, but reportedly as a result of a previous attack. The letter reads:

> "He has just found out that his father died on 1 July…His father ultimately died consequent to injuries sustained during an attack by Somalian militia forces."

[32] As already indicated the eighth submission attached the two Upper Tribunal decisions that concerned facts relating to a minority clan female and a child applicant without network or experience of Mogadishu that could not – on any view – effect this applicant's legal position in mounting a fresh claim.

[33] Dr Cullen's letters dated 16 July 2018 and 14 August 2018 referred to previous correspondence that the solicitor had attached to earlier submissions, but did not attach to this one. In so far as the Home Office was still asked here to consider medical grounds, I quote from the letter of 11 June 2018 attached to the seventh submission (and I bear in mind that a similar letter was attached to the fifth submission and served on the court during these proceedings):

> "Mr Mahmud describes a long history of being held and tortured by militia forces in Somalia. He has endured a protracted period of physical and mental torture all of which have left physical and mental scars. He has watched as these forces have murdered his brother and tortured his father. He, himself sustained many injuries. He was frequently beaten all over his body with rifle butts which were purposely fortified with extra weight to inflict maximum damage. These beatings were indiscriminate and all over his body. He has evidence of a fractured

> finger consequent to these attacks. He was also stabbed on a number of occasions and bears scars on his back and legs from previous knife wounds consistent with the history he gives of brutal assault. He also has reduced hearing and protracted vestibular difficulties and tinnitus consequent to blunt trauma to the ears."

[34] At that stage it would appear that Dr Cullen was entirely dependent on the applicant's account of the causation of injuries. It is an account which is in conflict with his asylum statement of evidence and his oral evidence before the First-tier Tribunal particularly as regards the knife attack and the fractured finger. The applicant also has never said that he saw his brother killed, or his father tortured. Dr Cullen then gives a description of symptoms of mental ill-health without purporting to diagnose them as a specialist, or to prescribe either treatment or medication for their occurrence (save sleeping pills as can now be seen from reading the disclosed prescription records):

> "Mr Mahmud's most urgent and difficult medical problem consequent to his treatment is Post Traumatic Stress Disorder. He is constantly agitated, restless, nervous and hypervigilant. He suffers from sociophobia and social avoidance. He has considerable difficulty with insomnia which adds to his fatigue. His mood is constantly low. He gets flashbacks about his time being held by Al-Shabaab which he finds distressing. He lives in permanent worry about the safety of his family back in Somalia.
>
> I feel that Mr Mahmud also may suffer from some personality issues that could compromise his capacity to cope with stressful situations leaving him more vulnerable in circumstances that he finds himself in at present. He is a Muslim and is currently in the middle of the holy month of Ramadan. The forced eviction has made his adherence to his religious customs extremely difficult."

[35] The impugned decision was promulgated on 17 October 2018. It refers (at pp. 3-4) to the seven sets of previous submissions (p. 3) and the previous findings of the First-tier Tribunal, especially at [29] – [36] containing Judge Hand's reasoning regarding the fabricated asylum claim and at [40] concerning the medical condition.

[36] As regards the purported fresh submissions, the decision maker (in line with Mr O'Donoghue before me) recognised these to be the claim by the applicant that he would be killed if returned to Somalia and that his father had been murdered.

[37] Having quoted the above letter from Dr Cullen of 16 July 2018 explaining that his father had died, the decision maker states:

> "No evidence of how this information was received has been submitted. The letter is written on the acceptance that the information is genuine. Therefore, the letter adds little weight to the claim." (p. 4).

[38] With regard to the two Upper Tribunal appeal determinations based on the woman and the child, it was concluded that the each case is considered on their own individual basis (p. 4).

[39] The decision maker then dealt with the submission that the applicant would be killed in Somalia and pointed out that this had been raised in multiple previous submissions. No new evidence had been supplied to substantiate the contention.

[40] The relevant part of the submission concluded with the following words:

> "After giving anxious scrutiny to your evidence and the Immigration Judge's findings, it is considered that your submission would not create a realistic prospect of success in front of an immigration Judge" (p.4)

[41] In the ECHR section dealing with other grounds for non-removal, the decision maker referred to the PTSD diagnosis and the GP letters of 16 July 2018 and 14 August 2018 confirming "*homelessness, PTSD and depression*". He then referred to background material, including the developing capacity of the Somali Mental Health Foundation, the opening of five mental health centres in the major cities, including Mogadishu, and the support that the United Nations World Health Organisation was providing by way of capacity building for mental health care throughout the country. For reasons examined in Part III below with regard to *AM Zimbabwe*, the decision maker quoted the then prevailing threshold tests requiring an exceptional denial of necessary medical treatment. Be that as it may, the decision maker observed:

> "You are not in need of 24/7 care, you are self-medicating, you are able to seek medical assistance even if you are homeless in the United Kingdom and you still have family in Somalia who you have failed to establish could not or would not be able to afford you support and assistance on return."

[42] The decision concluded at page 7 with the following omnibus statement:

> "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 you asylum…"

In a separate paragraph the decision maker added:

> "I have decided that the decision of the 1st August 2014 upheld by the Immigration Judge on the 21/3/15 should not be reversed."

[C] Argument based on *JM4*

[43] On behalf of the applicant Mr O'Donoghue QC and Mr McTernaghan primarily relied on wording identical to that quoted in [42] above in a decision by Mr Justice McCloskey (as the then senior judicial review judge in this jurisdiction with the added weight of his previous presidency of the Immigration & Asylum Chamber of the Upper Tribunal of England & Wales). The text appears to be a standard conclusion that Home Office officials use when they reject further submissions. In the case of *In re JM4* [2019] NIQB 61, his Lordship (at [19]) criticised its language in the following way:

> "Given the legal standards in play, there is no real scope for the restrained "*in bonam partem*" approach to this key passage. As *WN (DRC)* makes clear, it was incumbent upon the decision maker to pose the question of whether there was a realistic prospect of a tribunal, applying anxious scrutiny – and, I would add, applying the "lower" standard of proof applicable in asylum cases – concluding that the applicant would be exposed to a real risk of persecution on return to Zimbabwe. I am unable to identify the central ingredients of this test in the text of the impugned decision. The decision maker simply expressed his personal, subjective opinion and concluded that this was determinative of how a tribunal would approach and decide the case in the event of an appeal proceeding. Furthermore, the decision maker displayed no awareness of the requirement that his views were simply a starting point in the exercise. On the contrary, the decision maker's approach in substance was that of treating the fresh representations as an original application. Finally, there is a patent misdirection in the "should not be reversed" sentence. This discloses that the decision maker, erroneously, considered that his role was

> to determine whether the decision of the FtT should be affirmed. This is remote from what is required by paragraph 353 of the Rules. Given all of the foregoing, there is a clearly demonstrated misdirection in law."

[44] The applicant's submission was that as the wording here is identical to the wording used by the decision maker in *JM4*, then this impugned decision cannot stand.

[45] Mr Sands, who appeared on behalf of the respondent in this case and in *JM4*, submitted that this was an overly simplistic approach as it was still necessary to conduct a holistic examination of the new submissions, purported new material, and the original decision, all before deciding whether the criticism by the judge in *JM4* concerning the decision in that case should have any bearing on this one. He prayed in aid the different facts in *JM4* concerning a married man living in Northern Ireland with a wife (from whom he separated) and 3 children aged 15, 11 and 8. Moreover, it was apparent from the treatment of the decision making concerning the children that McCloskey J quashed the decision because of the combined errors identified in [19] and [24] of the judgment, and not simply with regard to his critique of the formulaic wording in [19] alone. By contrast the applicant's submission was extremely weak and essentially regurgitated submissions that had already been made and rejected on a serial basis.

[46] As regard the formulaic language, Mr Sands contended that there was nothing wrong in the first part of the wording that confirmed that the submissions "*did not meet the requirements of paragraph 353*". He added that from reading the totality of the letter it was abundantly clear that the decision maker considered that there was no realistic prospect of a future adjudicator, applying the rule of anxious scrutiny, concluding that the applicant would be exposed to a real risk of persecution on return.

[47] In support of his submissions, Mr Sands relied on decision of Mrs Justice Keegan in *In Re Chudron's Application* [2018] NIQB 58, which was upheld by the Court of Appeal in all parts, despite the fact that the same formula of words was used at the end of the decision letter. At [14], Mrs Justice Keegan explained:

> "I have set out the decision maker's letter in some detail at paragraph 13 herein. That is to illustrate how the various issues raised by the applicant have been examined. In my view the letter amply demonstrates that anxious scrutiny has been applied to this case. I am also of the view that the decision maker has asked the correct questions in reaching a determination. The decision of the Tribunal Judge in 2011 cannot be ignored in any assessment of the applicant's case because it established certain facts…. The

> applicant has not presented any new evidence as to these matters in that his affidavit replicates his previous statement. In that context the decision maker cannot be criticised for relying upon these factual findings. However, that is not the end of the matter because the decision maker must also consider the further submissions to decide if the test in paragraph 353 of the Immigration Rules is satisfied."

[D] Conclusions on Error of Law

[48] My conclusion on the *JM4* argument is that (like the Court of Appeal in *Chudron*, where judgment was given by the same judge as in *JM4*) I have not automatically read the material error identified in one case across to this one:

(i) There are some obvious reasons of caution about such an approach, most particularly that I have studied the tribunal decision, the submissions, the attached evidence, and the sequence of other submissions in this case, but I have not done so in relation to the *JM4* case.

(ii) Paragraphs [18], [19], [24] and [26-27] taken together indicate that the judicial review was allowed in *JM4* because of an accumulation of reasons, but primarily because of the court's concerns about compliance with the best interests of the children duty as governed by section 55 of the Borders, Citizenship and Immigration Act 2009. The finding at [24] that there were "*simply too many gaps, question marks and concerns*" regarding the best interests assessment that was four years old at the time of the impugned decision is the matter that the judge refers to at [26], which then causes him at [27] to conclude "*balancing everything*" that the decision should be quashed. I certainly do not read [19] of the judgment on its own to contain a ratio that a decision must be quashed for using the language formula that is there subjected to criticism.

(iii) Looking at [19] itself, the learned judge was particularly concerned about the absence of any formal direction requiring anxious scrutiny within the body of the impugned decision that he reviewed, although he did accept that its reasoning "*displayed the degree of rigour required by the anxious scrutiny principle*" [18]. By contrast the impugned decision in this case contained continuous references to the requirement of anxious scrutiny coupled with the phrasing that it was to be applied in objective prognosis of the "*realistic prospect of success*".

(iv) From the terms of paragraph 353 itself and *WM (DRC)* at [6], I agree with Mr Sands that no criticism of the first part of the quotation above can be made, because the requirement on the Secretary of State "*if the material is significantly different*" is to "*consider whether it, taken together with the material*

previously considered, creates a realistic prospect of success in a further asylum claim". That has been done in this case.

(v) I also do not understand it to be an error of law for the decision maker to end by declaring that it is not accepted "*that should this material be considered by an immigration judge, this could result in a decision to grant you asylum…*" McCloskey J may have been concerned that the deliberately low threshold of "*realistic prospects*" was potentially discarded by the more bullish and potentially subjective language of "*it is not accepted that…*" However, my overall reading of the decision under review in *these* proceedings does not lead me to that concern.

(vi) It was not disputed by Mr Sands that the phrase "*I have decided that the decision of [date] upheld by the Immigration Judge on the [date] should not be reversed*" is a misdirection as regards the fresh claim aspect of paragraph 353. It determines a different – anterior - question as to whether the previous decision to refuse asylum and protection should be upheld. I have checked all seven previous decisions on further submissions in this case and they all use the same wording. I remain puzzled as to why this wording has gained the currency it has. It may be because the extant version of the Policy on Further Submissions at [3.1] indicates that the Home Office will consider "*whether the new evidence changes the original decision to refuse, to ensure we grant protection and/or leave to remain to those who qualify for it*". It should also be borne in mind that it is open to a Secretary of State to allow such further submissions, and only if she is not minded to allow them, must she then decide whether there is nevertheless an arguable fresh claim. The impugned sentence appears in a separate paragraph to the sentence dealing with why there is no fresh claim. It may therefore be that the words criticised in *JM4* reflect this aspect of the policy, and the anterior aspect of paragraph 353, and not the normal issue analysed in a judicial review concerning paragraph 353 as to whether, or not, there is a fresh claim. If these words were the only test referred to there would be a more compelling reason to quash a decision, but in this case the decision maker has repeatedly referred to an objective anxious scrutiny prognosis of realistic prospects of success before a new tribunal. It is therefore more likely that the sentence reflects a genuinely additional observation that the Home Office has *in any event* not changed its mind.

(vii) Alternatively, Mr Sands suggested in oral submissions that this phrase may simply be some form of inelegant articulation of the *Derveseelan* principle, but if that is so, it would be better to articulate the principle and explain how it was applied in this decision, as the Court of Appeal did in *Chudron*, and indeed commended the underlying decision in that case for having done the same.

[49] Subject to some continuing uncertainty on my part as to the language used in last sentence as a separate paragraph of the text under discussion, I do not find that

it is sufficient to constitute a material error of law when read with the rest of the decision and the underlying evidence.

[E] Conclusions on Substance

[50] If that disposes of the error of law argument, I would only add as a reviewing judge by reference to the *Derveseelan* principles that I am independently of the view that it would be fanciful on the claimed new material that a fresh appeal could succeed before an immigration judge.

[51] The mere fact that the applicant's father has sadly died may well be relevant to his increased vulnerability (see below), but it cannot, at least in the minimalist way in which the further submissions have disclosed the matter, take the prospects of a fresh claim based on a risk of persecution on return further forward:

(i) All of the evidence and correspondence served by the applicant has failed to establish that the father has been *recently* murdered. On this I include the letter of Dr Cullen of 16 July 2018, the eighth submission of 23 August 2018, the first pre-action protocol letter of 5 September 2018, the ninth further submission of 13 December 2018 (see [17(xi)] above), the second pre-action protocol letter of 19 December 2018, the Order 53 Statement of 6 February 2019, the updated medical report of 7 March 2019 and the second affidavit of the applicant of 5 November 2019. Even if it is impossible to obtain any medical evidence as to the cause of his father's injuries and/or death, it was not beyond the applicant to explain whether it is his case that the death occurred as a result of injuries sustained during a new and recent attack as opposed to the 2013 attack. The doctor reports that the father "*ultimately died consequent to injuries sustained during an attack by Somalian militia forces*." (my emphasis) The second affidavit states "*My brother ….was murdered by the Al-Shabaab. My father was seriously injured and died of his injuries in July 2019* (sic)" [this must be 2018]. The juxtaposition of the two events (i.e. the brother being murdered and the father being seriously injured and then dying of his injuries) would rationally tend to suggest that both bereavements occurred as result of the same attack in 2013. I am uncomfortable that the applicant should be allowed to benefit from any ambiguity in this regard when the ambiguity arises entirely from his own evidence and representations made on his behalf.

(ii) The applicant has explained in the second affidavit that he was informed of the death by his surviving brother in circumstances where he could not call him back and has not been able obtain any further information. Again leaving aside whether it is possible to obtain formal post mortems and death certificates, the fact remains that there is no independent evidence that the father's death was caused by injuries sustained in the 2013 attack, or some later attack. There is also no evidence that has been gathered between 2013 and now to confirm anything about the father's claimed original injuries. As

the attack itself is a key matter that the Tribunal judge singled out as an implausible part of the asylum claim, the onus must lie with the applicant to produce something more than the pithy statement in the submissions and a letter from a doctor saying what he was told with no further independent detail. I make allowance for the applicant's present difficulties and that he received the news in a shocking way at a difficult time. But it is not impossible or impractical to make contact with the family in Somalia to find out more and this has not been done, despite the considerable opportunity to do so throughout the extended life of these proceedings.

(iii) My conclusions in (i) and (ii) above might arguably stand alone in their own right, but I reach them especially on the facts of this case because there have been inconsistencies over time as to what the applicant had said as to whether his father was attacked in 2013, and if so, in what way. The applicant said nothing in the screening interview and then veered from sometimes saying his father was left for dead, had his jaw broken, was shot in the head, and/or tortured. The use of the photographs showing no signs of significant injury has never assisted the case, but there has also been a failure to plug the gap in intervening years.

[52] Mr O'Donoghue submitted that if the drafting of the eighth further submission relating to the death of the father was vague, the Home Office was under an obligation to make further enquiries with the applicant to seek additional information, such as to establish who were the militia forces, when did the death occur, in what circumstances, and whether it was possible to provide more supporting information. I am not sure what else it is that the Home Office could discover from the applicant. If he was able or minded to answer his own lawyer's questions, he could and should have done so already, either in support of the seventh and/or eighth further submissions or by way of the repeated opportunities to serve evidence during these proceedings.

[53] The context here is important. This is not a first generation enquiry; although even then the onus is on the applicant to demonstrate the human rights risk: *Saadi v Italy* (2009) 49 EHRR 30 [129]. Rather this is a decision about the prospects of a fresh claim, as opposed to the conduct of a new enquiry. The burden must therefore be all the more upon an already failed claimant who is seeking to reopen a decision on his status where all other appeal rights have been exhausted and who is only required to meet a low evidential threshold in order to prevail. It is the applicant who must therefore make sufficiently clear submissions and supply fresh evidence. The Home Office is then under a duty to review the submissions with requisite care, with fidelity to the life or death issues potentially at stake, but that does not create a positive investigatory duty as a matter of public law or in accordance with this country's international human rights and humanitarian law obligations.

[54] Having studied primarily the decision under review, I turn to the fact that the impugned refusal of the eighth submission followed the refusal of seven others, of

which the sixth refusal on 12 May 2018 reviewed all previous refusals (for which see [17 (vi)] above). What is particularly pertinent is what was said about the letters of Dr Cullen and especially the text dealing with the account of torture detailed at paragraph [33] above. The relevant letter had been served with the fifth submissions ([17(v)]):

> "The cause of your injuries, as relayed by Dr Cullen, is based entirely on your account and is not based on any other independent evidence. Whilst a medical report, letter or health assessment may or may not give an opinion on your physical or psychological condition being consistent with your story, it cannot be considered in isolation and cannot normally be regarded as providing by itself, a clear and independent corroboration of your account of how these injuries were sustained. The mere fact of the existence of scars does not, in itself, indicate that the injuries were sustained in the manner you have described. It is also noted that there is no indication in Dr Cullen's letter that when examining your scars the test set out in the Istanbul Protocol, which is the criteria for the examination and evaluation following specific forms of torture, was applied. Furthermore, you are reminded that the Immigration Judge at your appeal determination found you not to be credible and that you had fabricated an account of events to justify your 'erroneous claim for asylum'. Therefore, it has to be concluded that Dr Cullen's latest letter adds little weight to your claim that you were tortured and persecuted by Al-Shabaab and that you will be tortured again if removed to Somalia."

[55] I agree with these observations. In the correspondence between 2015 and 2019 Dr Cullen has described in short order and repeatedly similar terms the applicant's physical injuries and mental health symptoms. He has essentially done this by documenting matters that the applicant has told him. What the letters relay about causation are matters within the applicant's personal knowledge and which (on his account) were always known to him from the outset of advancing his asylum claim.

[56] These letters are also not formal medico-legal reports. With regard to the physical injuries, the doctor does not detail his own physical examination, but I am prepared to accept that one took place. Still, what they describe are general injuries, which by their nature alone could have multiple causes. Although not a mandatory pre-condition for their consideration it is correct that the letters are not drafted in conformity with the guidelines in paragraphs 186-187 of the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "the Istanbul Protocol", submitted to the

United Nations High Commissioner for Human Rights in 1999. The relevant part of the Protocol urges the admission of clear statements as to the degree of consistency of old scars found with the history given as to their cause:

> "Examination and Evaluation following specific forms of Torture:
>
> 186. … For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution:
>
> (a) Not consistent: the lesion could not have been caused by the trauma described;
>
> (b) Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;
>
> (c) Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;
>
> (d) Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;
>
> (e) Diagnostic of: this appearance could not have been caused in anyway other than that described.
>
> 187. Ultimately, it is the overall evaluation of all lesions and not the consistency of each lesion with a particular form of torture that is important in assessing the torture story (see Chapter IV.G for a list of torture methods)."

See the endorsement of this aspect of the Istanbul Protocol in *SA (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1302 at[26] – [30], *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10 at [16] and [22] – [23] and *MN v Secretary of State for the Home Department and IXU v Same (Aire Centre and others intervening)*[2020] EWCA Civ 1746 [103]-[104].

[57] In *SA (Somalia)*, in a judgment of Sir Mark Potter, President of the Family Division, the Court of Appeal in England & Wales said the following at [28]:

> "In any case where the medical report relied on by an asylum seeker is not contemporaneous, or nearly contemporaneous, with the injuries said to have been

> suffered, and thus potentially corroborative for that very reason, but is a report made long after the events relied on as evidence of persecution, then, if such report is to have any corroborative weight at all, it should contain a clear statement of the doctor's opinion as to consistency, directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution. It is also desirable that, in the case of marks of injury which are inherently susceptible of a number of alternative or "everyday" explanations, reference should be made to such fact, together with any physical features or "pointers" found which may make the particular explanation for the injury advanced by the complainant more or less likely."

At paragraph [30], the Court of Appeal commended that those requested to supply medical reports supporting allegations of torture by asylum claimants would be well advised to bear in mind paragraphs 186-187 of the Protocol, as well as to pay close attention to the guidance concerning objectivity and impartiality set out at paragraph 161 of the Protocol.

[58] Most recently in *MN v Secretary of State for the Home Department; and IXU v Same,* the Court of Appeal in England referred to paragraph 186, and particularly the language of "*consistent*" and "*highly consistent*" and added the following:

> "[103] In the former case the finding of consistency is essentially neutral: it means only that the physical signs do not contradict the applicant's account. In the latter case, however, it positively supports, or corroborates, the account: the degree to which it does so will depend on just how few or unlikely the other possible causes are.
>
> [104] That categorisation has not been systematically adopted in other contexts, but it illustrates that in this field, whatever linguistic purists may think, there can be degrees of "consistency". It is important to distinguish between cases where an expert is saying no more than that the signs found and/or symptoms reported are consistent with the treatment recounted by the applicant – "mere consistency" cases – and cases where they what they are saying is that they are positively supportive of it. Even if the witness does not use the Istanbul categories, the intended meaning will usually be sufficiently clear from the context. This needs to be borne in mind both

> when considering the report of an expert in a particular case and when considering the case law."

[59] In substance Dr Cullen's letters do not reflect the taking of a detailed account and analysing its consistency with the examined injuries in the fashion commended by the above authorities. That does not at all make them inadmissible, but the decision maker cannot be impugned for giving them little weight in the assessments of the prospects of a fresh claim. In particular, Dr Cullen has done no more than to suggest that the injuries are "*consistent*" with the account of torture. By implication that means that they are equally consistent with other "*everyday*" explanations (*SM (Somalia)*) and advise no more than that "*the physical signs do not contradict the applicant's account*" (*MN and IXU*). Without a firmer expert forensic analysis this evidence cannot begin to confirm when, where and who inflicted the injuries. In *MN (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 1601 [9] – [11] the Court of Appeal held that where it is impossible to say when the injuries were inflicted and an appellant's own account of the circumstances in which he received them was unsatisfactory in a number of significant respects, the mere fact of identified scars cannot be definitive of an issue.

[60] Moreover, Dr Cullen's summary of the reported ill-treatment is itself inconsistent with previous accounts that this applicant has given, for instance the stab wounds; as well as problematic for introducing a suggestion that the father was tortured, as opposed to shot on a single occasion: see a similar issue arising in *HS (Uganda) v Secretary of State for the Home Department* [2012] EWCA Civ 94 [30]. I therefore conclude that this evidence could not surpass even the low threshold for identifying a fresh claim. In reaching that view I make no criticism of the GP who has evidently taken considerable steps to attend to the wellbeing of his patient.

PART III: MEDICAL REASONS POST-*AM (ZIMBABWE)* (Ground 1B)

[A] Relevant Facts

[61] The applicant's medical condition was considered by the First-tier Tribunal at the appeal hearing and was referred to in the application for leave to appeal, but without the benefit of any independent evidence. His medical condition, including mental health issues, was then considered in the refusals letters on several occasions between 2015 to 2017, leading to the sixth refusal of 12 May 2018 (see [17](vi) above). That refusal letter commented on the fact that the Home Office had repeatedly indicated that the matters raised by the applicant did not meet the very high threshold of the case law and then cited *N v SSHD* (see below). It concluded that there was no evidence that would fall within the extreme and exceptional category that would meet the Article 3 ECHR medical threshold for refusing return. In refusing the seventh submission on 9 August (see [17] (vii)) the Home Office referred to all previous submissions and again detailed the extent to which it was not possible for the available evidence to meet the threshold identified in *N v SSHD*. That submission inferred from Dr Cullen's letter of 11 June 2018 (essentially similar

in terms to the letter of 5 October 2017) that the described condition of PTSD had not required either medication or specialist supervision beyond GP supervision. It was considered that Somalia had a health-care system which, if ever necessarily required, was capable of assisting the applicant.

[62] The relevant parts of those refusals must then be read with the content of the eighth refusal letter of 17 October 2018 that I have quoted at [41] above. It detailed an up-to-date position on the mental health treatment conditions in Somalia that were capable of responding to the applicant's condition of PTSD and depression. Having cited *N v SSHD* and other case law, it concluded that the applicant's mental health difficulties did not require 24/7 care, or supervised medication, and that his wellbeing could be sufficiently dealt with in Somalia without breaching Article 3.

[B] Previous Domestic/ECHR Approach

[63] The impugned decision in this case, as well as the earlier decisions summarised above, were all made prior to the judgment in *AM Zimbabwe v Home Office* [2020] UKSC 17. The significance of *AM* is that it evolves upon the previously binding hard case outcome of *N v Secretary of State for the Home Department* [2005] UKHL 31 at [69] (per Baroness Hale) that held that removal on medical human rights grounds could only be prohibited if:

> "[The] applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity."

[64] Lord Brown underscored the discomfort of the decision in his observation at [91]:

> "It is perhaps not, however, self-evidently more inhuman to deport someone who is facing imminent death than someone whose life expectancy would thereby be reduced from decades to a year or so."

However, Lord Brown at [88], [89] and [93] also supported the outcome, not least because of the justifiable distinction between a negative obligation, not to deport a dying person before their imminent death, as opposed to a positive obligation, to treat a person with life-threatening illness indefinitely. He did not regard such a broader obligation to be caught by Article 3.

[65] The approach was upheld by the Grand Chamber in *N v United Kingdom* **(**2008) 47 EHRR 38 at [42-43] and [51]. Beyond situations of imminent death as previously dealt with in *D v United Kingdom* (1997) 24 EHRR 423 at [51] to [54], the

Court countenanced the possibility that only other "*very exceptional cases*" of humanitarian need could serve to prohibit removal for want of adequate facilities available in the country of destination:

> "[43] In summary, the Court observes that since *D. v. the United Kingdom* it has consistently applied the following principles:
>
> > Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D.* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.
>
> [44] The Court does not exclude that there may be other very exceptional cases where the humanitarian considerations are equally compelling. However, it considers that it should maintain the high threshold set in *D. v. the United Kingdom* and applied in its subsequent case law, which it regards as correct in principle, given that in such cases the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country.
>
> [45] Although many of the rights it contains have implications of a social or economic nature, the

> Convention is essentially directed at the protection of civil and political rights…. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights…. Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.
>
> [46] Finally, the Court observes that, although the present application, in common with most of those referred to above, is concerned with the expulsion of a person with an HIV and AIDS-related condition, the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost."

[C] The Supreme Court Judgment in *AM*

[66] The treatment of the issue by the Supreme Court in *AM* was occasioned by the Grand Chamber judgment in *Paposhvili v Belgium* (App. No. 41738/10 13 December 2016) [2017] Imm AR 867 [183], which added detail to what is required for "*very exceptional cases*" that would otherwise prevent removal on medical grounds when death is not imminent:

> "The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N v The United Kingdom* …which may raise an issue under article 3 should be understood to refer to situations involving the removal of *a seriously ill person* in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real

> risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to *a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy*. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness. (My emphasis)"

[67] In his Supreme Court judgment in *AM*, Lord Wilson (with all other Justices in agreement) reviewed the evolution of the approach to prohibited removal on Article 3 medical grounds under domestic and ECHR case law. He then described at [20] to [21], the life-threatening illness of Mr Paposhvili, which very much placed him into Lord Brown's moral conundrum of someone not facing imminent death, but whose life expectancy would considerably decrease if deported. Having noted the reasoning of the Grand Chamber in its judgment at [183], his Lordship then drew out the following additional features of the judgment at [23]:

> "(a) in para 186 that it was for applicants to adduce before the returning state evidence "capable of demonstrating that there are substantial grounds for believing" that, if removed, they would be exposed to a real risk of subjection to treatment contrary to Article 3;
>
> (b) in para 187 that, where such evidence was adduced in support of an application under Article 3, it was for the returning state to "dispel any doubts raised by it"; to subject the alleged risk to close scrutiny; and to address reports of reputable organisations about treatment in the receiving state;
>
> (c) in para 189 that the returning state had to "verify on a case-by-case basis" whether the care generally available in the receiving state was in practice sufficient to prevent the applicant's exposure to treatment contrary to Article 3;
>
> (d) in para 190 that the returning state also had to consider the accessibility of the treatment to the particular applicant, including by reference to its cost if any, to the existence of a family network and to its geographical location; and

(e) in para 191 that if, following examination of the relevant information, serious doubts continued to surround the impact of removal, the returning state had to obtain an individual assurance from the receiving state that appropriate treatment would be available and accessible to the applicant."

[68] At [32] – [33], Lord Wilson then gave guidance on how these procedural obligations on retuning states were to be interpreted in the future:

> "[32] …The basic principle is that, if you allege a breach of your rights, it is for you to establish it. But "Convention proceedings do not in all cases lend themselves to a rigorous application of [that] principle …": *DH v Czech Republic* (2008) 47 EHRR 3, para 179. It is clear that, in application to claims under Article 3 to resist return by reference to ill-health, the Grand Chamber has indeed modified that principle. The threshold…is for the applicant to adduce evidence "capable of demonstrating that there are substantial grounds for believing" that Article 3 would be violated. It may make formidable intellectual demands on decision-makers who conclude that the evidence does not establish "substantial grounds" to have to proceed to consider whether nevertheless it is "capable of demonstrating" them. But, irrespective of the perhaps unnecessary complexity of the test, let no one imagine that it represents an undemanding threshold for an applicant to cross. For the requisite capacity of the evidence adduced by the applicant is to demonstrate "substantial" grounds for believing that it is a "very exceptional" case because of a "real" risk of subjection to "inhuman" treatment. All three parties accept that Sales LJ was correct, in para 16, to describe the threshold as an obligation on an applicant to raise a "prima facie case" of potential infringement of Article 3. This means a case which, if not challenged or countered, would establish the infringement: see para 112 of a useful analysis in the Determination of the President of the Upper Tribunal and two of its senior judges in *AXB v Secretary of State for the Home Department* [2019] UKUT 397 (IAC). Indeed, as the tribunal proceeded to explain in para 123, the arrangements in the UK are such that the decisions whether the applicant has adduced evidence to the requisite standard and, if so, whether it has been successfully countered fall to be taken initially by the

> Secretary of State and, in the event of an appeal, again by the First-tier Tribunal."
>
> [33] In the event that the applicant presents evidence to the standard addressed above, the returning state can seek to challenge or counter it in the manner helpfully outlined in the judgment in the *Paposhvili* case at paras 187 to 191 and summarised at para 23(b) to (e) above. The premise behind the guidance, surely reasonable, is that, while it is for the applicant to adduce evidence about his or her medical condition, current treatment (including the likely suitability of any other treatment) and the effect on him or her of inability to access it, the returning state is better able to collect evidence about the availability and accessibility of suitable treatment in the receiving state. What will most surprise the first-time reader of the Grand Chamber's judgment is the reference in para 187 to the suggested obligation on the returning state to dispel "any" doubts raised by the applicant's evidence. But, when the reader reaches para 191 and notes the reference, in precisely the same context, to "serious doubts", he will realise that "any" doubts in para 187 means any serious doubts. For proof, or in this case disproof, beyond *all* doubt is a concept rightly unknown to the Convention."

[D] The Applicant's Reframed Submission

[69] The original Order 53 Statement pleaded that the respondent had unlawfully reached a conclusion which, on the available evidence and having regard to the applicant's medical condition, personal circumstances and the unavailability of appropriate medical care and treatment in Somalia, it was not open to the decision maker to make. Given that pleading I did not regard it as necessary for the applicant to require leave to further amend the Order 53 statement. Rather, I allowed him to argue that even if evidence was insufficient in domestic law to require the decision maker to grant the applicant's further submissions of 23 August 2018, this court was now nonetheless required, given the subsequent change in domestic law by reference to *AM Zimbabwe* and, in particular, the test now to be applied by the decision maker determining further submissions, to set aside the decision issued to the applicant. Counsel put the argument in two ways, which was helpfully produced into writing, which also had the benefit of respondent counsel being clear about the case he had to meet. It was submitted:

> "First, that the medical evidence that was in the possession of the decision maker from Dr Cullen, in particular of the 16th July 2018 and the 14th August 2018,

> was sufficient to raise a prima facie case capable of meeting the Article 3 ECHR threshold test in accordance with paragraphs [32] and [33] of the judgment of the Supreme Court in *AM*; and
>
> Second, that even if the medical evidence was, in the opinion of the court, insufficient of itself to raise a prima facie case capable of meeting the Article 3 threshold test, that the Court, in the discharge of its own obligation in public law to scrutinise anxiously the decision making process, having regard to the fact that there is now a new test that was not in the contemplation of the applicant and respondent as of the 23rd August 2018, 17th October and/or 10th December 2018, and further having regard to the fact that the applicant's medical condition may, upon further reasonable enquiry, reach the required threshold set out in *AM*, the court ought to set aside the decision and remit the matter back for fresh consideration of the matter based on evidence properly gathered by reference to the new domestic law test."

[70] On behalf of the respondent, Mr Sands argued that the available evidence could not remotely meet the prima facie case required by *Paposhvili v Belgium* [183] read with *AM* [32] and [33]. *Paposhvili* himself was a "*very*" seriously ill man (see [194] – [207] of the judgment) who died before the Grand Chamber heard his case, who suffered from life-threatening leukaemia, active pulmonary tuberculosis and hepatitis C, and who had six months to live if returned to Georgia without his costly and complex treatment. The decision in *Savran v Denmark*, App No. 57467/15 1 October 2019, which has post-dated *Paposhvili* and itself is to be heard by the Grand Chamber, concerned a 4:3 divide in the Chamber judgment with regard to a man who had lived in Denmark since he was six, who suffered "*serious and long term*" paranoid schizophrenia. He required extensive and permanent medication to manage psychotic episodes, periodically causing his committal to hospital, with no available family support upon return to Turkey, and no established outpatient assistance that he could receive once released from intensive care hospital admission (see [14] and [63] – [67]).

[71] By contrast, Mr Sands submitted that the documents produced from 2015 through to this hearing described the applicant's condition as one of anxiety, depression and, perhaps, post-traumatic stress disorder. He then made some of the points foreshadowed above. No psychiatric reports. Nothing but GP entries and descriptions. I would add that the recorded medication (primarily to aid sleeping) has hardly been concordant with suffering from a major depressive disorder, with or without PTSD and anxiety components. On top of that the applicant has not availed himself of in depth psychiatric services, even though he has been willing to seek support in other ways to aid his various genuine predicaments. Taking *Savran* as a

contested but nevertheless the broadest interpretation of the *Paposhvili* principle, it was said that this applicant was not in a similar category of mental illness or consequential danger for want of clinical treatment, or support.

[72] Mr Sands went on to advocate for scepticism about whether the mental health evidence was capable of any belief. He referred to a short report in 2014, provided by a previous GP based in Sunderland to other solicitors who acted for this applicant before he relocated to Northern Ireland. That doctor reported the applicant as having a pain in his leg and back, ear wax, and tinnitus and deafness in one ear for the last 7 months. In response to a request for assistance for the asylum claim this previous doctor had written in May 2014 (in the aftermath of the First-tier Tribunal judgment), "*Mr Mahmud has never mentioned any ill-treatment in Somalia. Patient is physically and mentally fit in himself*". A referral to a specialist regarding the right ear on 19 March 2014 confirmed, "*There is no history of trauma*". Mr Sands compared these **features** of the medical records with the letters written by Dr Cullen on 11 June 2018, and earlier such similar versions. The respondent's case before me was that applicant had invented a medical back-story when he moved to Belfast and became Dr Cullen's patient.

[E] Conclusions

[73] My short answer to the re-framed part of the ground is that there is no prima facie case that could meet the *AM/Paposhvili* threshold and neither is there any realistic prospect of there being so. As to the first way that Mr O'Donoghue put his case, the decision makers on various submissions, including this eighth one, took seriously *as far as it went* the evidence that was served regarding emotional suffering and potential diagnoses of mental illness. To that end, even though the evidence clearly did not meet the test in *N v Home Office*, the decision referred to the evolving mental health care standards in Somalia. It was deemed relevant that the applicant would be returning to a country he knew as an adult, with continuing connection to family who live there. I would add that he apparently cares for them and they stay in contact with him. Dr Cullen does not describe the applicant as suffering from a serious psychiatric condition, nor needing specialist care in or out of hospital, nor requiring extensive medication, and no one has ever suggested otherwise. On all the available evidence it is therefore not possible to conclude that the applicant is a "*seriously ill person*" who would be exposed on return to "*a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy*" (*Cf. AM* [183]). The prima facie case is not met, and no burden of proof or enquiry has passed to the Home Office.

[74] However, I also take into account that the Home Office refusal decisions have continued to consider general evidence of local treatment. That evidence indicates a capacity to sufficiently cope with the psychological and personality issues that have repeatedly been described. The ailments, no doubt significant to the applicant, have never been described by anyone as so substantial that they would require the Home Office under the revised case law guidance to make detailed enquiries with

authorities in the receiving state. I therefore find in substance that the approach to the eighth further submissions have sufficiently complied with the procedural standards identified in *AM* [23] and [32] – [33] and *AXA* [112] and [123].

[75] Mr O'Donoghue's fall-back submission was that the decision should be quashed and remitted in any event to allow this doctor, or someone else, to serve evidence aimed at the right legal test. I mean no disrespect to the anguish that this applicant may be suffering, including as a result of the decisions that the Home Office made against his interests in the heat of his grief for his father. However, with all the opportunities that he and his lawyers have had to convey a full appreciation of his mental health regardless of the relevant test, he has never gone beyond serving Dr Cullen's assessments. In aiming for a higher threshold (and claiming that was met) there was no reason to prevent this applicant from producing the fullest possible description of his psychiatric condition. I have seen nothing relating to the applicant's condition that may, upon further reasonable enquiry, reach the required threshold set out in *AM*. That case was remitted by the Supreme Court when the previous medical reports were more than five years old, but it was not in dispute that the appellant was HIV positive and there was an outstanding need to examine the availability of a specific medication in Zimbabwe that would prevent his lapse into full-blown AIDS. This is not a situation – as in *AM*, *Paposhvili* or *Savran* – where detailed examination of the issue requires further exploration. If there is genuinely more information to take into account, which for whatever reason has been withheld to date, I therefore do not find it must be considered by way of a remedy arising from this claim.

[76] In reaching that finding I am not persuaded that the applicant has necessarily invented all his symptoms since arriving in Northern Ireland and connecting with a new doctor. At the same time, it is harder to rely on a symptomology described by a later doctor who has not apparently as yet discussed with the patient why he did not raise the same symptoms with the earlier doctor.

[77] For all of the above reasons I refuse Ground 1 of the claim.

PART III: WITHDRAWAL OF ASYLUM SUPPORT (Ground 2)

[A] Context

[78] Despite all of the foregoing the applicant remained a migrant without regular status whose presence in this country was not unlawful, save that he also remained liable to removal at any time. That is a legally precarious position, although it is not without its right to have rights. It is also a psychologically and practically difficult position as asylum support can be withdrawn, removal directions can be issued and an applicant is liable to be detained pending removal. One of the applicant's rights is to make further submissions in support of a fresh claim, which we have seen the Home Office is under a duty to carefully consider. That creates an inter-relationship between paragraph 353 further submissions and the continuance of section 4(2)

support while the content of those submissions are being considered. The refusal of submissions generates an opportunity for asylum support to be withdrawn, which – at least in the case before me – has given rise to a tendency to make further ostensibly very similar submissions seemingly to forestall that event. The subject matter of both grounds began in just such a vacuum moment. The issues raised by Ground 2 focuses upon the co-dependency between the two processes. Between June and December 2018 that co-dependency was very much in evidence in this case. In order to understand this dispute I set out the relevant legal framework, policy, and case law. I then turn to the facts that have only recently been resolved as a result of further disclosure that was necessary to make on both sides during the life of these proceedings.

[B] Legal Framework

[79] The power to grant accommodation and financial support in these kind of cases is contained in section 4 of the Immigration and Asylum Act 1999. So far as material, section 4 (2) reads:

> "(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if -
>
> (a) he was (but is no longer) an asylum-seeker, and
>
> (b) his claim for asylum was rejected.
>
> (3) The Secretary of State may provide, or arrange for the provision of, facilities for accommodation of a dependant of a person for whom facilities may be provided under sub-section (2).
>
> (4) The following expressions have the same meaning in this section as in Part VI of this Act (as defined in section 94) -
>
> (a) asylum-seeker,
>
> (b) claim for asylum….
>
> (5) The Secretary of State may make regulations specifying criteria to be used in determining -
>
> (a) whether or not to provide accommodation, or arrange for provision of accommodation, for a person under this section;

(b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section."

[80] The terms of section 4(2) must be read with the Immigration and Asylum (Provision of Accommodation to failed Asylum Seekers) Regulations 2005 (SI 2005 No 930) under the rubric "Eligibility for and provision of accommodation to a failed asylum-seeker". Regulation 3 provides:

"(1) ….the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4 (2) or (3) of that Act are -

(a) that he appears to the Secretary of State to be destitute, and

(b) that one or more of the conditions set out in paragraph

(2) are satisfied in relation to him."

[81] The important provision of sub-paragraph (2) of regulation 3 is (e):

"(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."

[82] Regulation 2 of the 2005 Regulations provides that "destitute" is to be construed in accordance with section 95(3) of the 1999 Act. That is, a person is destitute if:

"… he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met) or (b) he has adequate accommodation or the means of obtaining it, but cannot meet other essential needs".

[83] The other conditions set out in paragraph (2) of regulation 3 are as follows (each is an alternative):

"(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom,

which may include complying with attempts to obtain a travel document to facilitate his departure;

(b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;

(c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available; [or]

(d) he has made an application for judicial review of a decision in relation to his asylum claim–

….

(iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980; …"

[84] The language contained in the relevant condition under paragraph (2) of regulation 3 of the 2005 Regulations (condition (e)) reflects that found in section 55(5)(a) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). This referred to "… *a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998)*". The provision was introduced to mitigate a situation that otherwise befell late asylum seekers, who had entered the country illegally without claiming asylum. In *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 Lord Bingham held at [7]:

> "A general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. It is not necessary that treatment, to engage Article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to "your mountainish inhumanity".

At [8] his Lordship found that the duty in section 55(5)(a) would arise:

> "When it appears on a fair and objective assessment of all relevant facts and circumstances that an individual

> applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life."

Lord Bingham spoke further of the need to take into account age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation. He added at [9]:

> "It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that [there, a late applicant for asylum] was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed. I do not regard *O'Rourke v United Kingdom* (Application No 39022/97) (unreported) 26 June 2001) as authority to the contrary: had his predicament been the result of state action rather than his own volition, and had he been ineligible for public support (which he was not), the Court's conclusion that his suffering did not attain the requisite level of severity to engage Article 3 would be very hard to accept."

[85] In a concurring judgment Lord Hope explained that the key to a proper understanding of section 55(5)(a)) (and I interpose with the extant regulation 3(2)(e)) lies in its use of the word "avoid" in the phrase "avoiding a breach" [43]. It followed that:

> "[44] The purpose of section 55(5)(a) … is to enable the Secretary of State to exercise his powers to provide support…and accommodation…<u>before</u> the ultimate state of inhuman or degrading treatment is reached. Once that stage is reached the Secretary of State will be at risk of being held to have acted in a way that is incompatible with the asylum-seeker's Convention rights, contrary to section 6(1) of the 1998 Act, with all the consequences that this gives rise to: see sections 7(1) and 8(1) of that Act. Section 55(5)(a) enables the Secretary of State to step in before this happens so that he can, as the subsection puts it, "avoid" being in breach." (My emphasis)

[86] Lord Hope added at [62]:

> "It may be … that the degree of severity which amounts to a breach of Article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to [the Secretary of State's] attention. But it is not necessary for the condition to have reached that stage before the power in section 55(5)(a) is capable of being exercised. It is not just a question of "wait and see". The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it."

[87] As to the duty to act at the threshold of imminence, as opposed to waiting for an actual state of inhuman and degrading existence, the judgment of the House of Lords in *Limbuela* must be read with the judgment of the Court of Appeal in England in *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, which recognised at [119(viii)] that the duty to provide support arises at the point that the applicant is "*verging*" on street destitution without sufficient security of charitable support. In *R (W) v Secretary of State for the Home Department (Project 17 intervening)* [2020] EWHC 1299 (Admin) at [42] the Divisional Court (Bean LJ and Chamberlain J), applying *Limbuela* held as follows:

> "…section 6 of the [Human Rights Act] 1998 …imposes a duty to act not only when someone *is* enduring treatment contrary to Article 3, but also when there is an "imminent prospect" of that occurring. In the latter case, the law imposes a duty to act prospectively to avoid the breach" (original emphasis)."

[88] Similarly, in *Stach v Department for Communities and Department for Work and Pensions* [2020] NICA 4 the Court of Appeal confirmed that a "*proactive duty*" arose "*when the applicant made clear that there was an imminent prospect of a breach of Article 3*". *Limbuela* had rejected a "*wait-and-see*" test. Rather "*an imminent prospect of suffering proscribed Art 3 treatment was the applicable criterion*" [41] – [42].

[89] *Stach* was the first decision in this jurisdiction to consider *Limbuela* in detail and it has added some helpful guidance. In cases where treatment proscribed by Article 3 has not yet occurred, but may be "*looming*", Lord Justice McCloskey at [47] said it was apt to borrow from the Article 2 right to life case law. He identified the

test as whether an asserted risk of falling prey to the proscribed treatment is "*real and immediate*". The well-known authorities – cited in the judgment - confirm that "*Real*" means substantial and significant and not remote or fanciful. "*Immediate*" means present and continuing. Evidence of this then triggers the application of a positive obligation to act based on the so-called "*Osman*" duty (see *Osman v United Kingdom* (2000) 29 EHRR 245 at [115]). Applied to the street destitution context, the Court of Appeal adopted the reasoning in *Watts v United Kingdom* (2010) 51 EHRR SE6:

> "For the court to find a violation of the positive obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court reiterates that the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, including in respect of the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."

[90] Lord Justice McCloskey at [49] - [50] further analysed how what is reasonable will be context determined by the extent to which the State has caused the ill-treatment itself, or stood by in the face of the person being in a state of distress that the State is not directly responsible for. On the facts of *Stach*, the Court of Appeal did not find the respondent Department for Communities to have caused a breach of Article 3 in its denial of housing benefit to a non-asylum EU freedom of movement jobseeker who was able to return to Poland at all times, and who had not sought to bring his homelessness to the attention of the authorities during the period to which his claim applied. He also failed to provide any further evidence on the issue when the Court of Appeal asked him to do so by way of a case management direction (see [51] – [52] and [57]-[61]).

[91] The duty to obviate the risk of Article 3 ill-treatment has been recognised to apply in principle to the exercise of the power under section 4(2) of the 1999 Act and regulation 3(2)(e). Breaches have been found as a result of challenges to delays in responding to section 4(2) applications (*R(MK) v Secretary of State for the Home Departmen*t [2012] EWHC 1896 Admin per Foskett J) and in relation to sub-contracted service providers failing to house successful section 4(2) applicants in a reasonable time period (*R (DMA) v Secretary of State for the Home Department* [2020] EWHC 3416 Admin per Robin Knowles J).

[92] However, although *Limbuela* applies in principle to the section 4(2) context it is equally understandable that it should apply in a qualified fashion. A key feature of the street destitution problem, repeatedly acknowledged in the reasoning in the House of Lords and earlier case law, is that the asylum seeker is entitled to remain in the country to pursue asylum claims, but otherwise prohibited from both working and receiving other forms of benefit. See, for example, Lord Brown at [100]:

> "…asylum seekers, it should be remembered, are exercising their vital right to claim refugee status and [in the] meantime are entitled to be here. Critically, moreover, unlike UK nationals, they have no entitlement whatever to other state benefits."

[93] It is for that reason that the voluntary homeless case of *O'Rourke v UK* had no bearing on the decision in *Limbuela* with regard to those who were pursuing asylum claims (even if late ones). In the asylum claiming context the State had caused the person's situation of being both roofless and cashless (see [9] per Lord Bingham, [60] per Lord Hope). The asylum claimant is not merely pursuing a right of residence, he is contending for the life-threatening inability to return. The distinction is important because there is no public law right that entitles a foreign national, who is in need of public support, to be permitted to come to or remain in this country, while pursuing a claim to a right of residence. As Simon Brown LJ (as then) remarked in *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* ('JCWI') [1996] EWCA Civ 1293:

> "…non-asylum-seeking immigrants have since 1980 invariably been admitted subject to the condition of 'no recourse to public funds' and, more importantly, unlike asylum seekers, can in any event return to their country of origin."

[94] It follows that in the section 4(2) context it may be necessary not to discontinue asylum support prior to the consideration of paragraph 353 further submissions. That would also flow from paragraph 353A that mandates that no person can be removed from the country during the period that those submissions are under consideration. However, there may be circumstances (considered in the next sections) where it is public law and human rights compatible for the Secretary of State to conclude that the adverse consequences of withdrawing asylum support from an already failed asylum seeker who has exhausted their appeal rights can be properly justified by virtue of the person being able to voluntarily return to their country of origin without any undue pressure to relinquish their right to freshly claim asylum and otherwise seek humanitarian support.

[95] Lastly on legislative framework, I draw attention to the extent to which the Immigration Act 2014 has streamlined the process of removal of failed asylum seekers. A single letter now suffices to reject a fresh claim and put a migrant on

notice of removal, as well as his liability to be detained pending that removal. Moreover, Part III of the 2014 Act generally restricts the access of irregular migrants to residential tenancies, employment, NHS facilities, and obtaining bank accounts, driving licences etc (the so-called "compliant environment" or, more usually, "hostile environment" provisions): see the overview in *R (FB (Afghanistan) and Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338 [5] – [21]. The effect of these measures is to make the continuing presence of the irregular migrant all the more marginal, especially so when there has been a discontinuance of section 4(2) support. The State will not house him and private landlords must shun him on pain of civil and criminal penalty if they fail to do so: see *R (JCWI) v Secretary of State for the Home Department* [2020] EWCA Civ 542 at [19].

[C] Policy

[96] The Secretary of State has published her policy in relation to section 4(2) of the 1999 Act. This is entitled "Asylum support, section 4(2): policy and process" (16 February 2018) ("the section 4(2) policy"). With regard to support under regulation 3(2)(e) the policy recognises as a "*first step*" in determining whether accommodation or support must be provided that the test for *Limbuela* will apply. This includes ascertaining whether the person can obtain assistance from charitable or community sources or through the lawful endeavours of their family and friends. It goes on:

> "Where the decision maker concludes that there is no support from any of these sources then there will be a positive obligation on the Secretary of State to accommodate the individual in order to avoid a breach of Article 3 of the ECHR. However, if the person is able to return to their country of origin and thus avoid the consequences of being left without shelter or funds, the situation outlined above is changed. This is because:
>
> - there is no duty under the European Convention on Human Rights to support foreign nationals who are freely able to return home (see: *R(Kimani) v Lambeth LBC* [2003] EWCA Civ 1150);
>
> - if there are no legal or practical obstacles to return home, the denial of support by a local authority does not constitute a breach of human rights (see: R *(W) v Croydon LBC* [2007] EWCA Civ 266).
>
> A practical obstacle to departure would usually only exist if the person is unable to leave the UK because they lack a necessary travel document but are taking reasonable steps to obtain one, or they are unfit to travel for a medical reason. However, it will be unnecessary to consider

whether a person in these circumstances needs to be supported under regulation 3(2)(e) as they can be considered under regulations 3(2)(a) or (b).

Whether there are legal obstacles to return should be considered on a case by case basis on the information available, but examples of where it should usually be accepted that they exist are where:

- they have submitted a late appeal against the rejection of their asylum or Article 3 ECHR claim and the First-tier Tribunal is considering whether to allow the appeal to proceed out of time;

- *they have submitted further submissions against the refusal of their asylum or Article 3 ECHR claim remain and these remain outstanding* (my emphasis).

If the decision maker is unsure as to whether it would be appropriate to provide, or continue to provide, support in any given case for human rights reasons, a senior caseworker should be consulted as part of the decision-making process. *If there are no legal or practical obstacles preventing the person leaving the United Kingdom, it will usually be difficult for them to establish that the Secretary of State is required to provide support in order to avoid breaching their ECHR rights."* (my emphasis).

[97] As regards the relationship between further submissions under the paragraph 353 and the continuation of section 4(2) support, the policy continues:

"The existence of further submissions, combined with the fact that the person does not have access to accommodation and the means to live (or will shortly be in this position) may mean that support will need to be provided to prevent a breach of their ECHR rights. Wherever possible, the further submissions should be considered at the same time as consideration is given to the support application.

If it is found that the further submissions are clearly abusive, manifestly unfounded or repetitious the application should be refused, which in practice will be at the same time as the further submissions are rejected. (my emphasis)

> However, a decision on the application should not be unnecessarily delayed to await the further submissions decision. Generally, decisions should be made within five working days, but careful consideration should be given to any additional factors that call for the case to be given higher priority and the decision made more quickly. Where the following circumstances apply, reasonable efforts should be made to decide the application within two working days (the list is not exhaustive):
>
> - people who are street homeless;
> - families with minors;
> - disabled people;
> - elderly people;
> - pregnant women;
> - persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence;
> - potential victims of trafficking."

[98] Although there is a statutory right of appeal against the discontinuance of support under section 103 of the 1999 act, the policy allows for the making of applications outside of the appeal system:

> "If a person's application for support is refused or their support has been discontinued and they have not appealed against the decision or their appeal has been dismissed, any further application for support should not be entertained unless the application is made on a different basis or there has been a material change of circumstances. The decision letter should explain why it is considered that there has been no material change of circumstance and refer back to the reasons why it has already been found that the person does not qualify for support."

[D] Decided Case Law

[99] The policy cites two cases in support of the proposition that section 4(2) may be withheld from irregular migrants in need (see [96] above). In *R (Kimani) v Lambeth LBC* [2003] EWCA Civ 1150 the Court of Appeal in England & Wales (Lord Phillips MR, Judge LJ and Maurice Kay LJ) considered the removal of local authority funding under a different statute. The applicant and her child had remained in the UK to pursue what was described as a "*spurious*" appeal regarding a right to

residence based on what had been held to be a sham marriage. At [49] the Master of the Rolls stated:

> "A State owes no duty under the Convention to provide support to foreign nationals who are permitted to enter their territory but who are in a position freely to return home. Most people who fall into this category are given leave to enter on condition that they do not have recourse to public funds."

[100] *R (AW) v Croydon LBC* [2005] EWHC 2950 Admin (upheld on appeal) was a decision concerning section 4(2) of the 1999 Act and local authority funding under section 21 of the National Assistance Act 1948. Mr Sands directed me to the first instance decision, rather than the appeal judgment that is referred to in the policy itself. At [35] Lloyd Jones J (as then) cited *Kimani* in support of the "*well-established*" agreed position between the parties that if there are no legal or practical obstacles to prevent a failed asylum-seeker returning to his country of origin, the denial of support by the Secretary of State or a local authority would not constitute a breach of that person's Convention rights. Article 3 did not impose a duty on the State "*to provide support for a failed asylum-seeker when there is no impediment to his returning to his own country*".

[101] The Court in *AW* did recognise that in some cases there may be obstacles to such a return, in which case section 4 of the 1999 Act functioned to empower the Secretary of State to provide or to arrange for the provision of facilities for the accommodation of a failed asylum-seeker. Various first instance decisions (including *AW*) have dealt with the extent to which the making of further submissions in support of a fresh claim could be such a reason to continue or resume section 4(2) funding pending a decision on the merits of the submissions.

[102] In *R (Nigatu) v Secretary of State for the Home Department* [2004] EWHC 1806 Admin, Collins J rejected the contention that the mere making of a submission in furtherance of a fresh claim would turn the applicant into an asylum seeker and therefore entitle him to asylum support under section 95 of the 1999 Act, as opposed to only requiring support on the narrower basis contained in section 4(2). The proposition has since been put beyond contention in *R (Robinson) v Secretary of State for the Home Department* (see [20] above). The court went on to analyse whether funding of a failed asylum seeker should nevertheless continue in the face of further submissions. The judge acknowledged (at [19]) that depriving an individual of support in the meantime "*may put an altogether illegitimate pressure upon the individual, who may have a genuine fresh claim, to give up if the alternative is effectively destitution*". He therefore regarded it as "*thoroughly undesirable for the Secretary of State automatically to cease providing any support and disregard what is said to be a fresh claim*" [23]. Having indicated that much must depend on the circumstances of the individual case, the court recognised at [25] that "*there was another side to the coin*":

> "[Counsel] told me that she had been involved in a case where there had been no less than seven alleged fresh applications. Each time one was rejected, before removal could take place, another was put forward. One can see that in that sort of situation and where, for example, the alleged fresh claim contained nothing that was essentially new, and only arose sometime after support had been removed and when removal was due to take place, it may well be that the Secretary of State could properly refuse any further support. In addition, again this is obvious, if someone had remained in the country after his support had been removed, the Secretary of State might well properly reach the conclusion that he did not need any further support. He should not be regarded as destitute, or more probably that section 4 would not come to his aid."

Collins J concluded at [26]:

> "Those are all matters that would have to be taken into account when considering the circumstances of any individual case. But I am satisfied that the making of what is asserted to be a fresh claim does not automatically trigger the right to continuing support as an asylum seeker. That only arises when the Secretary of State decides, obviously as soon as possible, that it can be properly regarded as a fresh claim, whether or not, as I said, in the end it succeeds."

[103] In *AW*, Lloyd Jones J agreed with the analysis in *Nigatu* and added the following at [69]:

> "It seems to me that pending a decision by the Secretary of State on whether the further representations constitute a fresh claim, the Secretary of State will not be bound *in every case* to provide support under section 4 where the other requirements of that section are met. *In my view it will be open to him, or to NASS, to decline to do so, for example on the grounds that the further representations are manifestly unfounded, or merely repeat the previous grounds or do not disclose any claim for asylum at all*." (my emphasis)

The judge added at [76]:

> "It is only in the clearest cases that it will be appropriate for the public body concerned to refuse relief on the basis

> of the manifest inadequacy of the purported fresh grounds. In addition, where appropriate the individual will have recourse to judicial review in order to challenge such a decision. Moreover, the alternative contended for by the Claimants would lead to a situation in which failed asylum-seekers could secure assistance for prolonged periods on the basis of purported fresh claims which were manifestly nothing of the sort."

[104] In *R(MK) v Secretary of State for the Home Departme*nt [2012] EWHC 1896 Admin at [51] Foskett J interpreted an earlier version of the above policy on section 4(2) to mean that the Secretary of State will continue to provide support and assistance "*during the period that new representations made by the [failed asylum seeker] said to amount to a 'fresh claim' are considered*". The Court's observations at [57] bear relevance to the issues that arise in the extant challenge:

> **"**The practical tensions that can arise between the need conscientiously to carry through the exercise in paragraph 353 and the need, also to be carried out conscientiously, to consider whether section 4 support, where claimed by the applicant, should be granted pending the final decision on the new submissions given that in the vast majority of cases the new submissions are rejected are tolerably easy to identify without the need for a great deal of evidence to support the proposition. Given that every such applicant will already have had his or her initial asylum or human rights claim rejected and will, in many cases, have pursued all available appeal and challenge processes, the not unnatural starting-point for evaluating any apparently new claim will be one of some scepticism. One question is the extent to which, if any, such scepticism should or may be allowed to impact on any associated application for section 4 support."

[105] The judge in *MK* then answered his own question at [81] that further submissions that contained no real detail and merely asked for reconsideration of the case, were precisely the sort of submissions that can properly be identified as clearly unfounded so as to refuse support in line with the *AW* case. The positon aligns with the current version of the policy already quoted at [97] above.

[E] Relevant Facts

[106] This applicant has a long and complex history of asylum support that is interwoven with the making and refusing of the repeated further submissions as detailed in [17] above. According to the first affidavit of the respondent's witness Caryl Bond, who is the civil servant employed in the Home Office as the Asylum

Support Senior Case Worker, the chronology involved six applications for funding, before the current dispute. She summarised that these applications were made:

(i) On 6 October 2014, refused 24 November 2014, appeal dismissed 19 December 2014, all apparently when there were no further submissions;

(ii) On 13 April 2015, this time granted on the same date because of the extant consideration of the first further submissions ([see17(i)] above), but discontinued on 25 May 2015 in the light of those further submissions having been refused on 1 May 2015;

(iii) On 26 August 2015, after the making of the second further submissions in mid-2015 ([see17(ii)] above) and granted on 3 September 2015, to then be discontinued on 21 November 2015, in the light of those further submissions having been refused on the 15 October 2015;

(iv) On 11 July 2016, on grounds of destitution and medical grounds (without any further submissions), refused on 29 July 2016, appealed on 10 August 2016, but the appeal was withdrawn;

(v) On 18 April 2017, on grounds of destitution and having lodged his third further submissions (see [17 (iii)] above), granted on 19 April 2017 and discontinued on 31 May 2017, in the light of the refusal of the further submissions on 11 May 2017;

(vi) On 19 July 2017, on grounds of destitution and having lodged his fourth further submissions (see [17(iv)] above), granted 21 July 2017, continued to 16 May 2018, when support was discontinued apparently after both the fifth further submissions had been refused on 17 January 2018 (see [17(v)] above), and the sixth further submissions had been refused on 12 May 2018 (see [17(vi)] above).

[107] As with all letters of its type, the letter of 12 May 2018 that gave reasons to the applicant for refusing the sixth further submissions informed him that he now had no basis to continue to stay in the United Kingdom and that he was expected to make arrangements to leave without delay. He was afforded the details of the Home Office Voluntary Return Service, who would provide help with the costs of his tickets or other practical assistance. He was also told that persons who require, but no longer have leave to enter or remain are liable to removal under section 10 of the Immigration and Asylum Act 1999 (as amended by the Immigration Act 2014). He was warned that he was also liable to be detained and that if he did not leave as required he would be liable to enforced removal to Somalia.

[108] On 16 May 2018 the Home Office's "Section 4(2) National Team" wrote to the applicant to inform him that his asylum support would be discontinued from 9 June 2018. For reasons that will become important the letter provided the following email

address for any further correspondence: ASCorrespondence@migranthelp.co.uk. The letter then stated as follows:

> "You were granted support on the basis that you met the conditions set out in paragraph 3(2)(e) of the 2005 Regulations. This was because you made further submissions to the Home Office that you asked to be treated as a fresh application for asylum under the Refugee Convention or under Article 3 of the [ECHR].
>
> However, these submissions have been rejected. A copy of the letter sent to you setting out the reasons is enclosed [Note: this was the refusal letter in response to the sixth further submissions dated 12 May 2019].
>
> Furthermore, I do not consider that you meet any of the other conditions sets out in paragraph 3(2) of the 2005 Regulations."

[109] The letter concluded that it was open to the applicant to appeal against the decision to discontinue the asylum support under section 103(2A) of the Immigration and Asylum Act 1999. No appeal was brought in this instance, but as can be seen from the policy (quoted at [98] above) it remained open to the applicant to apply directly to the Home Office to renew his section 4(2) support if his circumstances changed. On the same date, the Asylum Contract Manager of the NIHE wrote to the applicant to inform him that his accommodation support would end on 30 May 2018 and that he must leave the home by that date.

[110] Due to the applicant being unable to read or write English, he says that he had no knowledge of the consequences of these letters until men came to take control of his accommodation on 30 May 2018. The Home Office has no record of an eviction event, but it is not disputed that accommodation support ended from that date. After the applicant's financial support stopped on 9 June, he went to see his solicitor on 11 June, who then took steps to try and help him.

[111] At their meeting on 11 June 2018 the applicant told his solicitor that he had been sleeping on the streets around Botanic Avenue and outside the mosque. He was, at the very least, in a vulnerable state as described by the letter of Dr Cullen dated 11 June 2018. According to the solicitor, the applicant was very frightened and believed that he was going to be deported. His immediate and primary concern was to press the merits of his further asylum claim.

[112] By way of overview, what happened next is that the solicitor then lodged the further submissions on 13 June 2018 (see [17(vii)] above), but as on previous occasions she sought renewed accommodation and financial support. This was done via the Bryson House Charitable Group, of which more below. It was the solicitor's

understanding that a section 4(2) application was sent to the Home Office on 17 June 2018. No reply was made to that application despite enquiries made by Bryson House, but when the seventh further submissions were refused on 9 August 2018, the solicitor wrote to the Home Office on the provided email on the 10 August, indicating that the client was street homeless. When she made the eighth further submissions on 23 August, the solicitor added details about his state of destitution (see [17(viii) above]). Those submissions were refused on 17 October, by which time the solicitor had already begun pre-action correspondence. The refusal of the eighth further submissions were not received until 10 December 2018, by which time a covering letter recognised that "*mental health issues*" were involved and that the applicant was a "*vulnerable person*". Reference was made to his suicidal state as indicated in the eighth submissions. For those reasons, it was suggested that it would help to "*mitigate any distress*" if the client was told of the outcome of the application on a face to face basis. The legal representatives were also "*respectfully requested*" to encourage their client "*to seek assistance regarding his health/wellbeing where appropriate*". Separate correspondence was sent to the GP.

[113] This judicial review did not begin its substantive hearing before me in March 2020 with agreement or clarity as to the facts. In her first affidavit in these proceedings dated 10 December 2019, Caryl Bond believed that a seventh application for asylum support was received only on 3 September 2018, with no reference at all to events designed to renew asylum support between June and August 2018 (see [106] above). The September application referred to by Ms Bond would have coincided with the eighth further submissions lodged on 23 August 2019 (see [17(viii) above). Ms Bond's first affidavit suggested that a request was made for further information on 5 September via Bryson House, so described as "*a social enterprise charity*", which it was believed was not responded to, leading to a refusal of the application on 19 September 2018, and the issue of section 4(2) funding only arising thereafter as a result of the bringing of the judicial review.

[114] This evidence starkly contrasted with the evidence served on behalf of the applicant. In her first affidavit on her client's behalf, dated 24 January 2019, the applicant's solicitor detailed that applications for renewed support and accommodation, along with follow up correspondence, had been repeatedly made between June and November 2018 both via Bryson House and its case worker Sebastine James, and directly through the email address supplied by the Home Office., namely ASCorrespondence@migranthelp.co.uk. This had been done particularly between July and August in a period where the Home Office gave no account of having received any such applications. Ms Stewart maintained that the Home Office would have known that the applicant was street homeless. For example on 10 August 2018 she emailed at the address ASCorrespondence@migranthelp.co.uk, to urge a response to the application for support and emphasised that her client remained destitute, by which she explained that he was sleeping on the streets, despite lodging further submissions on 13 June 2018. She added that he was in poor mental health and had recently learned of his father's death. When the applicant brought her the above referred to letter from the

Home Office dated 5 September on 18 September, requiring further information as regards asylum support, the solicitor averred that she replied immediately and exhibited her reply as sent to ASCorrespondence@migranthelp.co.uk. She emailed on that date supplying all that was required. There was no response from the Home Office.

[115] When this case was first listed for a substantive hearing in March 2020 there was good faith, but nevertheless ongoing, confusion on both sides as regards some crucial features, namely the role of Bryson House, the nature of the Migrant Help email address, and what consequences both of them had for establishing whether, or not, the Home Office knew, or ought to have known, that the Applicant was exposed to a real and immediate risk of street destitution while it considered the various further submissions. It was therefore agreed by both parties to be necessary to adjourn in order to enquire into those matters. The exercise, somewhat prolonged through the challenges of Covid-19, established a number of facts that were previously either unknown, or not sufficiently clear. There was good reason to allow both parties to serve affidavits to remedy what was hitherto an incomplete understanding. The facts, as now largely agreed, show the applicant's case getting unhappily and repeatedly lost in a system.

[116] By way of generality:

(i) The Home Office casework system, 'Atlas', deals with the status of asylum support funding across the United Kingdom, and (amongst other things) is the internal platform for disposing of renewed section 4(2) applications.

(ii) Migrant Help is a UK Charity, which provides support to asylum seekers. It has been awarded a contract by the Home Office for the provision of advice and guidance for asylum seekers and as a single point of contact for them for issues arising from their migrant status.

(iii) ASCorrespondence@migranthelp.co.uk is a designated email address for contact with the Home Office asylum support casework (albeit via the subcontractor, Migrant Help) who then uploads the communications on to Atlas.

(iv) Bryson House (full name Bryson House Intercultural Asylum Advice Service) is a Northern Ireland based social enterprise which is sub-contracted by Migrant Help to provide this support in Northern Ireland.

(v) Mr Sebastine James was a case worker at Bryson House, who no longer resided in the United Kingdom, or was otherwise contactable, by the time of these proceedings. Bryson House deferred to the Home Office as to whether it was allowed to release Data Protection Act protected information to these proceedings and would not voluntarily provide a statement to the applicant

for the purposes of the resumed hearing. I was not asked to order that it should.

[117] Despite the original belief of the Home Office that that there had been a single application to renew asylum support received in September 2018, and then rejected for failure to provide specified requested information, Ms Bond's second affidavit dated 15 September 2020 amended her evidence in a number of significant respects:

(i) From 22 June (not 17 June as Ms Stewart believed), Bryson House, sub-contracted through the Home Office's national agent Migrant Help, received an application for the applicant's renewed section 4(2) support. It contained letters from the applicant, and an independent witness, both of which confirmed that he was street destitute. Through clerical error, perhaps relating to the spelling of the surname, the application although uploaded by Migrant Help on the Atlas system was never responded to, leading to it being aborted on 17 July 2018. Neither Bryson House, nor the applicant were notified. This first application for renewed support therefore crossed over with the making and the rejection of the seventh further submission.

(ii) Having received no response from the original application of 22 June, the applicant's solicitor made the above referred to further efforts to renew financial support, including by the email on 10 August 2018 via the Home Office supplied email address (see [114] above). It was agreed that email was again uploaded onto the Atlas system by Migrant Help, but again not responded to, this time because it was put on to a document sharing platform known as 'Move It' within the Atlas system that was not routinely monitored by Home Office staff.

(iii) A further application for section 4(2) support was made via Bryson House on 28 August 2018 and received on 3 September 2018. This triggered the Home Office request for financial information from the applicant that was sent to Bryson House on 5 September. It was now accepted that the applicant's solicitor had duly replied on the designated migrant help email address (see [114] above), but the information (again) was not considered by the Home Office. Migrant Help have confirmed that that they attempted to upload the email on to Atlas, but it was rejected with an error message. Migrant Help then put the information on to the same Move It platform that the Home Office was not regularly monitoring.

(iv) There were follow up emails from Mr James on 2 November 2018, which were received, but they led to further correspondence as to previous decision making that Mr James wrote in an email on 19 November had not been received by either the applicant or Migrant Help. I presume this was a reflection of both sides' misunderstanding the extent to which previous applications had been lost in the system. However, the misunderstanding was

never resolved, and the Home Office has given no account of what happened to a letter from the applicant dated 24 September 2018, which explained again that he that he was street destitute (see, further, [118](xiii) and (xiv) below].

(v) No evidence was produced as to the guidance, or otherwise, given to either Migrant Help and/or Bryson House, as to the operation of the Atlas program, including the protocol for using the Move It platform, or what mitigating steps, if any, were required with regard to the logging of aborted claims and/or error messages in the face of uploaded data.

(vi) It was not disputed that the applicant, both directly through his solicitor and through Mr James, made efforts to seek an update on the post 23 August application for renewed support, only to find that it had been refused for failure to provide the information that had in fact been provided.

(vii) That application for renewed support crossed over with the making and the rejection of the eighth further submission. Although it was promulgated on 17 October, the refusal letter was dated 10 December and not received until 12 December. It was not clear why this was the case, but I note that the applicant's solicitor left her old firm in Mid-October, and only came on the record at her current firm, who act for the applicant in this case, in November 2018. It may have been that letters were mistakenly sent to the old firm, but this was not definitively established in the evidence before me.

[118] Drawing upon the disclosure from both parties, Mr O'Donoghue and his legal team were able to show that a number of steps were taken to draw the Home Office's attention to the applicant's rough sleeping and mental health predicament between June and December 2018:

(i) From 13 June 2018, the Home Office was sent the letter from Dr Cullen that specified that the applicant had been removed from his accommodation, which gave cause for concern that his mental health and personality issues could compromise his capacity to deal with his current circumstances and generally leave him more vulnerable;

(ii) From the 14 June 2018, the Home Office GCID record for the applicant noted that he had "*no fixed abode, living with different friends and also sleeps on the streets sometimes…does not get any money, is homeless, gets food from home plus Nicras* [Note: NICRAS is an NI Refugee Community Organisation, est. 2002]";

(iii) From 22 June 2018, the uploaded application that was in due course aborted, contained a letter from a local housing landlord, effectively an independent witness, dated 18 June 2018 that indicated his understanding that the applicant had previously been sleeping in the mosque, but was now no longer

allowed to live there, such that he was "*truly homeless*" and (from a lay perspective) the witness commented that the applicant seemed decidedly altered in his personality;

(iv) The same application, contained a statement from the applicant that he had provided to Migrant Help dated 19 June 2018 that confirmed that he had been sleeping rough and sofa surfing since his eviction on 30 May 2018 and that having initially stayed at the mosque, he was no longer allowed to do so;

(v) From 23 July 2018, Sebastine James used the provided migrant help email address to seek an update on the status of the section 4 application;

(vi) From 10 August 2018, the Home Office was sent the email on the Migrant Help address which referred to the applicant's "*poor*" state of mental health and that he was "*sleeping on the streets*";

(vii) From 15 August 2018, the applicant's solicitor sent a letter from the Red Cross to Mr James at Bryson House that confirmed that the applicant was sleeping rough and that his financial assistance from the organisation was time limited (it was not clear as to whether this letter was forwarded to the Home Office);

(viii) From 23 August 2018, the Home Office received the eighth further submission (see [17 (viii)]) that contained Dr Cullen's letter of 16 July 2018 referring to the applicant's current difficulties with "*anxiety, depression and homelessness*", which had been aggravated by his discovery of his father's death;

(ix) The same eighth submissions focussed considerably on destitution, indicating that the applicant had an outstanding application for housing through Bryson House, that there had been no approval of the application despite repeated attempts by himself and his solicitor to obtain an answer, including a reference to the 10 August email, and that he had only received a letter refusing his further asylum claim, as opposed to dealing with his application for financial support; his change of personal circumstances was summarised in the available box as, "*I am destitute, I feel suicidal*";

(x) From 28 August 2018, a further application for section 4(2) support, which the Home Office received, contained a letter from the Belfast City Mission of the same date saying that the applicant had stayed at the premises, but could no longer do so, which meant he was "*homeless and destitute*" (and from thereafter the applicant states that he had exhausted his places to stay);

(xi) The same application contained a letter from the Red Cross confirming that the Applicant had received very limited financial assistance from the organisation (£130 between 8 June and 24 August), but was now no longer eligible for any more money;

(xii) On 5 September 2018, the Home Office sent a letter to Bryson House acknowledging the section 4(2) application of 28 August, but asking for further financial information that the applicant's solicitor replied to on 18 September 2018 to confirm that he had no bank accounts, had never been employed, had no assets of any kind and remained destitute since 30 May 2018;

(xiii) On 24 September 2018, the applicant provided a further statement to the Migrant Help addressed "*To: Asylum Support*" referring back to the letter of the Home Office letter of 5 September and which personally confirmed that he had no assets, had never had employment, and that he remained "*street destitute and require[d] support*";

(xiv) On 2 November 2018, Mr James used the ASCorrespondence@migranthelp.co.uk email to check whether there was a response to the information that was submitted on 24 September 2018 [which by inference appears to be an email that forwarded the applicant's letter of (xiii) above];

(xv) As part of the judicial review papers served on or about 25 January 2019, the Home Office received a letter from Dr Cullen dated 4 December 2018, which reiterated that the applicant's current state of homelessness was causing him considerable stress and difficulty.

[119] The applicant's evidence is that the above information reflects that he was homeless from 30 May, that he had some opportunity to stay in Belfast City Mission in August and to receive small amounts of funding from the Red Cross, but was then continuously street homeless from the end of August 2018 until the order for interim relief that was agreed to on 7 February 2019. He had by that time endured the harsh winter months. The letters from the doctor suggest that the patient was getting increasingly desperate. Moreover, the solicitor, who knew her client for more than 18 months, describes a situation where he was becoming demonstrably more fragile, sometimes unable to speak to her when they were in contact, uncontrollably upset, finding the situation utterly hopeless and buckling under extreme stress.

[120] The respondent's legal position on the section 4(2) funding has evolved over time during the life of the litigation:

(i) In the skeleton argument (served prior to Ms Bond's first affidavit), her counsel submitted that this ground of challenge was academic as the support had been renewed and the issue was entirely dependent on the challenge to the failure to recognise the fresh claim.

(ii) In the second skeleton argument (served after Ms Bond's first affidavit), it was submitted that the issue was entirely disposed of by *Kimani*, because at the time that the funding was stopped in May 2018, there was no extant further submissions, and therefore no basis to conclude anything other than that the applicant was the author of his own misfortune by refusing to voluntarily leave the country. The submission was made off the back of the erroneous belief at that stage, that the applicant had failed to respond to request for further information in September 2018, and therefore no further applications for funding were afoot until the bringing of the judicial review.

(iii) As a result of the adjournment for both sides to investigate the evidential position, it became clear to the respondent (as properly disclosed by Ms Bond's second affidavit) that further applications had been made in both June and August, and the request for further information had been duly answered in September, but inadequately administered on the Atlas system. Against that factual matrix, the respondent in a supplementary skeleton argument altered her case to submit that the threshold for Article 3 destitution had not been met and/or that the applicant was not a credible witness as to his rough sleeping. Mr Sands continued, however, to rely on *Kimani* and in the oral hearing he drew attention to the endorsement of *Kimani* in *AW*.

[121] In the light of the final disclosure, Mr Sands also made a discrete submission that Bryson House, and by extension Migrant Help who uploaded the material on to Atlas, were *the agents of the applicant*, such that that the Home Office was neither responsible for any mistakes that may have been made, or seized with constructive notice of the information that was provided in the June section 4(2) applications, or the various emails that were sent on the Migrant Help email address from June through to November.

[122] For the applicant, Mr O'Donoghue stood by the efforts of both his instructing solicitor and Bryson House to properly pursue the fresh applications for renewed asylum support. Both in June and August those applications were made while the Home Office were seized with further fresh claim submissions. No one had suggested that the applications for funding were made as some form of abuse of process. It was for the Home Office to deal with the applications in a public law compatible fashion. It had chosen to contract with Migrant Help, and had presumably allowed Migrant Help to contract with Bryson House to deal with applications of this nature. There was no basis to conclude that either Bryson House or Ms Stewart had failed on their part to pass on necessary information. By dint of their arrangement with the Home Office, Migrant Help were understandably viewed

by asylum seekers and their representatives as receiving communications on behalf of the Home Office. Indeed, this was a view that was actively encouraged by the Home Office by using a third party email address, but with no suggestion that it was not its own. Overall, the demonstrated failure to take into account the communications between Migrant Help and the Home Office lay with the Secretary of State and not the applicant. The information (summarised in [118] above) was made available, but to no avail in terms of producing a considered response seized of all relevant information.

[F] Conclusions

[123] The issue I have to decide has not been the subject of extensive consideration in the appellate courts in the United Kingdom, or apparently at all in this jurisdiction. That may be because someone who obtains permission to judicially review a refusal of further submissions in support of a fresh claim will generally cause his asylum support to be renewed and so the underlying section 4(2) matter is not litigated. I was pressed by the Home Office to regard the issue as academic for that very reason in this case, and one can see that similar submissions have succeeded to that end in England.

[124] The case law cited at [99] to [103] above, although not strictly binding on me should be followed. One reason to do so is that it has been accepted to be correct for some time in England and it would be wrong for there to be a lack of parity of approach in different parts of the United Kingdom. Having said that I follow the case law foremost because it must be correct that the protection under section 4(2), when the person is a failed asylum seeker, is narrower than the protection under section 95 of the 1999 Act when there is a recognised, but pending, asylum claim, whether an original one or a fresh one. That is because:

(i) There is a long established acceptance that the asylum seeker falls into a special category of need because he cannot return for fear of persecution and human rights abuse, but is denied any recourse to income in the host country. It cannot be right to force him into abject poverty as a price for him fairly establishing his claim that he is unable to return. The reasoning is prevalent in *JCWI* and *Limbeula*;

(ii) Parliament has clearly structured section 4(2) in more limited terms than section 95, including requiring street destitution, as opposed to mere destitution (so defined), and providing for a temporary accommodation while applications for asylum are processed, whereas section 4(2) includes no provision for temporary support pending the processing of further applications. As Hodge J (as then) described it *R (Matembera) v Secretary of State* [2007] EWHC 2334 Admin at [15], there is here a detailed scheme, comprising of "*a main duty to support asylum seekers and a less comprehensive scheme where, after an adverse asylum decision, there is a danger of destitution*."

[125] I make it clear that it is the reasoning of the cited cases that I respectfully adopt, including the reasoning in *Kimani* that is not a section 4(2) case, but was adopted by analogy in *AW*. *Kimani* identifies a general principle that there is no basis to obtain financial support for foreign nationals with leave to remain in this country on condition of otherwise no recourse to public funds who have the option to return home. *Stach* has said the same thing with regard to the EU jobseeker who has no asylum claim. I note *Kimani* as a starting point, but I also accept Mr O'Donoghue's submission that it is an authority where it was established prior to the proceedings that there was no asylum case to make. It does not deal with the interplay between the provision of support and the pending determination of further submissions in support of fresh claims.

[126] It is cases such as *Nigatu* and *AW* that are therefore relevant to the present dispute. Those authorities hold that the question of whether a failed asylum seeker can continue or renew his asylum support while he seeks a determination of further submissions is a fact sensitive issue, including whether the multiple repetition of new further submissions can justly be allowed to resuscitate discontinued support. Those cases have proved to be important to understanding this claim, but they do not deal with the practical problems that arose in this case in terms of properly registering the applications that were made and duly disposing of them in a public law compatible fashion.

[127] It is important to work through sequentially the junctures that this applicant found himself in as regards the overall system of United Kingdom immigration and asylum law. Section 95 protects a person who is yet to have a determination of an asylum claim, including a claim that has been deemed to be fresh by virtue of a positive paragraph 353 decision. Section 4(2) and regulation 3(5)(e) protects a person who otherwise has none of the practical impediments to leaving the country contained in regulations 3(5)(a) to (c), but awaits the determinations of further submissions on a fresh claim. Assuming that the determination on the further submissions on 12 May 2018 was lawful itself, it was not unlawful for the Secretary of State to withdraw asylum support at the point in time when that determination was made.

[128] At that stage, it might have been open to the applicant to judicially review both the decision to refuse the sixth further submission and the consequential discontinuance of the asylum support. Instead he made further submissions and sought to renew the financial assistance. Given the history, that was at least an understandable choice from his point of view, given that on several previous occasions when further submissions were refused and support was discontinued, it was the double act of yet further submissions and applications to renew, which successfully removed the applicant out of his destitution.

[129] Both the policy and the case law (see, *Nigatu* at [25], *AW* at [69] and *MK* at [81]) recognise that if further submissions are clearly abusive, manifestly unfounded or repetitious then an application for renewed funding should be refused, which in

practice will be at the same time as the further submissions are rejected. Although I note in *AW* at [76], Lloyd Jones LJ added that "*it is only in the clearest of cases that it will be appropriate ….to refuse [funding] relief on the basis of the manifest inadequacy of the purported fresh grounds*".

[130] From everything that it is now known, it *might* therefore have been open for the Secretary of State to make a clear decision that the further submissions and renewed applications had run aground on the banks of repetition and manifest unfoundedness. But the ground of review in this challenge is the refusal of accommodation and ancillary support "*pending*" the determination of his fresh application/further submissions made on the 23 August 2018 (see [2](b) above].

[131] The Home Office original defence in this case is that an application was received on 3 September, which produced a request for further particulars that were not answered. The evidence, in fact, shows that one application was made on 22 June 2018 that was lost through technical error, and an answer to the request for further particulars was given on 18 September 2018 (and apparently also by the applicant via Bryson House on 24 September) that were not taken into account prior to an automated refusal of the application.

[132] It follows that the Home Office has never given an answer that it will refuse to renew asylum support because (in the terms of its Policy) the application is "*clearly abusive, manifestly unfounded or repetitious*". In a given case it would be open for the Home Office to say that and give reasons as to why. However, that was not done in this case. Rather the respondent has given no answer at all, because of an incorrect assumption that the applicant had failed to answer the financial resources questions posed to him.

[133] The Home Office is under a duty to consider applications for section 4(2) support that are duly made through the available channels to make them. In the recent judgment of *R (DMA) v Secretary of State for the Home Department* [2020] EWHC 3416 Admin, Robin Knowles J recorded at [211] that the following was not in dispute (correctly in my view):

> "(a) that the Secretary of State had power under section 4(2) to support the claimants, (b) that Article 3 could mean that this power could be a duty in certain circumstances, (c) that if an application was made to her under section 4(2) she had a duty to consider and decide it…."

[134] In terms of discharging its duty to consider section 4(2) applications, I reject the submission that Migrant Help should be treated as only the applicant's agent and/or that the Home Office can avoid constructive knowledge of what is done by Migrant Help in its capacity as a subcontracted agent of the Home Office to initially process and communicate applications of this nature. I do not make these findings

based on the niceties of contract law, although I was shown nothing from a contract between the Home Office and Migrant Help to support the Secretary of State's submission. I accept that the applicant (and his lawyer) could justifiably regard that making applications through such officially endorsed channels meant that they would be acted upon. The Secretary of State has chosen to contract with Migrant Help in order to discharge her functions under the immigration laws and rules. The Home Office is free to do this, but the duty to discharge those functions remains hers.

[135] In common law terms, I therefore find that the Home Office had constructive knowledge of the information supplied via Migrant Help. In ECHR terms, I find that it knew, *or ought to have known*, of the consequences of its failures to renew asylum support pending its decisions on both the further submissions in June 2018 and in August 2018.

[136] Based on the summary of the available evidence, drawn together in paragraph [118], I further find that this applicant was either rough sleeping, or at imminent risk of the same during the period of correspondence from June through to December 2018. The Applicant is not an entirely reliable narrator, and it might be that he was not on the streets throughout the time period. There is reference to couch surfing and intermittent hospitality from others, including from the mosque. He says now that he never slept inside the Mosque, but there may have been times when shelter in the Mosque was more available. That would generally be so during the last period of Ramadan. But the test is one of imminence and there is sufficient evidence that the applicant was either rough sleeping, or on its real and immediate verge throughout the period. I also find that Dr Cullen has given a sufficiently reliable description of symptoms as regards depression, anxiety and PTSD. That is so even if clinical care observations of that nature cannot determine the issue of aetiology, or categorise what is described from the point of view of psychiatric expertise. This was undoubtedly a vulnerable man, all the more so because he was suffering a bereavement, which can only have made both the removal of his asylum support and the rejection of his further fresh claim submissions that much harder to endure. Finally, I accept the evidence of Ms Stewart that the client that she knows diminished in resilience and became increasingly vulnerable during this period. Hence her repeated and increasingly urgent efforts to try to change his destitute situation.

[137] The primary answer of the respondent to this evidence was that the applicant had lied to support his asylum claim and was therefore lying now. I do not find the situations to be like for like. This was a real time documented position of a socially disabled and marginalised resident of this country, who had contact with a solicitor, Home Office agents, the Red Cross and Belfast City Mission, and sought to exhaust all options. The full chronology and disclosure shows that he never stopped trying to obviate what was an objectively dehumanising situation. To this I would add that Part III of the Immigration Act 2014 (see [95] above) makes it less likely that a person can avoid street destitution over an extended period, simply because his options to

acquire the basic necessities of life through breaching his conditions of migrant entry are more steadfastly removed beyond his reach.

[138] All of that does not mean that the Home Office was mandated to renew the support, for the reasons identified in *Nigatu* and the other cases. However, given my findings in relation to Bryson House, Migrant Help and the relevant email address, it follows that the applications for renewed support were never properly considered. If they had been, I recognise the possibility that the Home Office might have rejected them on the grounds that they were co-dependent on a syndrome of repeated further submissions without merit. I recognise that not least because this case mirrors the anecdote of seven further submissions summarised by Home Office counsel to the judge in *Nigatu*. But the Home Office has not reasoned its positon in that way. It is not therefore for this court *in a case of this nature* to do that which the Home Office has not done.

[139] The *nature of the case* is critical. Its context resolves what otherwise might be a dilemma between two common aspects of public law adjudication, namely: (a) a court should not generally substitute its reasoning for that of the decision maker whose choices its reviews; and (b) in certain situations it is open for a court to declare that an error in decision making would have nevertheless made no difference. I am unwilling to substitute my reasoning and/or ignore failures in the reasoning of the respondent in this particular context. Of the context, including its warts and all disclosed by a lengthy analysis that has taken the parties and the court considerable time to piece together, I emphasise two features:

(i) First, the subject matter concerns the discharge of a duty to consider an application, which if rejected, has profound implications for the inherent dignity of a human being. That follows from the fact that I have found the applicant spent several months into the autumn/winter in a state of homelessness, without income, and in considerable physical and psychological destitution. An express respect for human dignity is emerging as a UK constitutional value in its own right (*R (A & B) v East Sussex County Council* [2003] EWHC 167 (Admin) [86]; *R (Osborn) v Parole Board; R (Booth) v Parole Board* [2013] UKSC 61; and *R (A and B) v Secretary of State for Health* [2017] UKSC 41 at [93]). It also clearly operates under the Convention case law (*Pretty v United Kingdom* (2002) 35 EHRR 1 [65]). However, one of the basic ways in which respect for human dignity has for a long time operated in this country has been to require properly reasoned reasons in the face of applications that are made, taking into account reasonably obtainable relevant information; and all the more so when the issues at stake have considerable implications for personal autonomy and resilience. Hard choices may nevertheless have to be made, but they must be made properly.

(ii) Second, although the making of the regulations and decisions about the distribution of funds, especially within the field of migrant law, must be a matter for Parliament, it has long been established that it is subject to the 'law

of humanity'. In *R (W) v Secretary of State for the Home Department (Project 17 intervening)*, the Divisional Court at [34] recently recalled the recognition of Simon Brown LJ in the first *JCWI* case at 292F-G that there were issues at stake in the complete denial of social security, coupled with the inability to work, that contemplate "*for some a life so destitute that… no civilised society could tolerate…*". The court in *W* (at [61] - [62]) found these concerns to exist within the common law, as well as pursuant to Article 3 ECHR. (See, generally, Sir Michael Fordham, 'Judicial Review Handbook' Seventh Edition 2020 (Hart) [7.6.3]). In this case, I am not called upon to judge the regulations, but I am required to determine whether the operation of a discretionary power has been properly exercised. The power under section 4(2), *even if* narrower than section 95 of the 1999 Act or section 55(5)(a) of the 2002 Act, was introduced to deal with basic issues of civility to others. And *even if* an end answer is the avenue of voluntary return, the end answer had not been reached at the time these applications were made. However messy the case was (and there may be other similar cases), it is mess relating to bare human existence that remains in the territory identified by Lord Ellenborough CJ in *Reg. v Inhabitants of Eastbourne* (1803) 3 East 103, 107, where he said:

> "As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving".

[140] This judgment overrides no positive law, but like the policy itself it does not exclude the possibility that section 4(2) support will be granted in the absence of a recognised fresh asylum claim. In my view the context therefore required a more exacting scrutiny than occurred here. It was incumbent on the Home Office to discharge its duties in a clear fashion, taking account of all relevant information, and to make its position clear to this applicant and those who acted for him. Given its failure to do so, I cannot conclude that the respondent has complied with her duties under section 4(2). It is not for this court to say that a better process of decision making would have led to the same outcome. In all the circumstances, I find that the applicant was not afforded a proper decision and on that specific basis I allow the challenge on Ground 2.

[141] In doing so, I make it plain that the public law wrong done to the applicant was neither intentional, or arguably necessary, given that that the respondent might well have avoided the wrong by operating a more efficient and adequate system. Had she done so, I have already indicated that a public law and policy compatible reason to end the cycle of repeated submissions and applications might well have been found in the applicant's case. The system, for reasons well known, but also evidenced in the case law before me, is overloaded, such that errors of this nature will occur. I have not found it right to blame the applicant for the deficiencies. To

withhold declaratory relief in this context would be a disservice to him and indeed to the respondent's future compliance with its duties. However, I do find that these matters are relevant to whether an additional award of damages is necessary to afford just satisfaction, which by agreement, I will await further submissions on as a result of the parties considering the judgment. For present purposes, I draw the parties' attention to the most recent review of the principles as they apply to this subject matter in *R (DMA) v Secretary of State for the Home Department* [336] – [341]. A more general analysis is provided by McAlinden J in *In Re Lorraine Cox* [2020] NIQB 53 [123] to [143].

CONCLUSION

[142] For the above reasons, I refuse the applicant's claim on Ground 1, both generally (Part II), and with regard to the reframed reliance on *AM Zimbabwe* (Part III). I allow the claim on Ground 2 based on the failure of the Home Office to take account of relevant evidence made available to it pending the decision on further submissions that were lodged on 12 June 2018 and thereafter on 23 August 2018 (Part IV).

[143] Finally, I record that as a result of a number of case management hearings and a hiatus in the substantive hearing both sides made considerable efforts to discharge their mutual duties of candour in what has turned out to be factually complex litigation. For the duty of candour for respondents, see *Citizens UK v Secretary of State for the Home Department* [2018] EWCA Civ 1812 at [106 (1)-(5)], and for its recalibrated, less exacting but nevertheless important, variant for an applicant, see *R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416 [71].

[144] That is important because candour, co-operation and disclosure in this case have mattered particularly in my reasons for rejecting Ground 1 (based in part on the multiple previous fresh claim submissions as relevant to understanding the impugned decision) and for allowing Ground 2 (based on discoveries derived from the further Home Office searches).

[145] In the end I was satisfied that there was sufficient understanding on both sides to proceed fairly with the claim. I make these observations not by way of criticism, but to respectfully reflect the reality that these matters are not easy and that the applicant lawyers and the State lawyers face different challenges in their service to their clients, and the issues, coupled with their rule of law commitments to ensuring just litigation processes. I am grateful to the legal teams, their clients, and those who assisted them for the presentation of their respective cases.