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2017 No: 012379/1

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY AIYING WU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT DATED NOVEMBER 2016

MAGUIRE J

Introduction

[1] The applicant in this case is a Chinese national. She is 53 years of age. Her immigration history, so far as relevant to these proceedings, is as follows:

Married in China to Mr Shi (who is now aged 55)	1985
3 children to the marriage who were born in China	
Child 1 Hai Ming Shi (now 30)	
Child 2 Hai Liang Shi (now 28)	
Child 3 Zhen Shi (now 26)	
Husband leaves China and travels to the United Kingdom	1998
All three children travel to the United Kingdom	
Child 1	July 2006
Child 2	-
Child 3	February 2008

Applicant arrives in the United Kingdom on a 6-month visitor's visa to visit daughter who was studying in Belfast	January 2009
Applicant remains as an over stayer following the expiry of her visitor's visa	June 2009
Applicant detected working illegally in the United Kingdom by police. Case drawn to the attention of the immigration authorities	February 2014
Applicant attempts to regularise her immigration status	February 2014
Initial application by applicant for leave to remain	September 2014
No reference to her children/grandchildren	
Application refused	March 2015
Second application for leave to remain – again no reference in it to children/grandchildren	August 2015
Second application for leave to remain refused	February 2016
Detained and served with removal directions	July 2016
Judicial Review proceedings taken but leave refused – court notes that in the papers there was no reference to her children/grandchildren	October 2016
Further representations submitted by the applicant's solicitor on her behalf	November 2016
Home Office accept that she was in a genuine and subsisting relationship with her husband but decide that the further representations made do not amount to a fresh claim	29 November 2016
This judicial review begins	February 2017

[2] In these proceedings the applicant makes the case that the decision of the Home Office in respect of its treatment of her further submissions was unlawful. This, it is alleged, was the case for two primary reasons:

- Firstly, it is alleged that the Home Office's treatment of what may be described as the "EX.1" issue (that of family ties with persons in the United Kingdom) was legally wrong.

- Secondly, it is alleged that the Home Office's treatment of her and her husband's Article 8 ECHR rights outside the rules was legally wrong.

[3] The net effect of these errors, the applicant argues, is that:

(a) Her further submissions should have been treated as fresh submissions.

(b) The Home Office should have held that, as a fresh claim, it bore a reasonable prospect of success before an immigration judge.

Hence the claim should have been permitted to go to the Lower Tier Tribunal. In these proceedings the applicant was represented by Mr Stuart Magee BL and the intended respondent was represented by Mr Philip Henry BL. The court expresses its gratitude to counsel for their very helpful oral and written submissions.

Rule 353

[4] The relevant rule at the centre of these proceedings is Rule 353. It reads:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn … 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."

[5] The law in respect of the interpretation of Rule 353 has been the subject of a recent decision by this court: see Jahany [2016] NIQB 35.

[6] The following paragraphs from the Jahany case are relevant to the present case:

> "[13] The correct way for the decision maker to address rule 353 has been the subject of considerable judicial guidance. A commonly cited passage is that found at paragraph 6 *et seq* of the court's judgment in

WM (Democratic Republic of Congo) v SSHD; AR (Afghanistan) v SSHD [2006] EWCA Civ 1495:

> '6. … [The Secretary of State] has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed…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 judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. …the Secretary of State in assessing the reliability of the new material, can of course have in mind where that is relevantly probative, any finding as to 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…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 the adjudicator, but not more than that. Second, … 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.'

[14] The approach of the court on review of such a decision was described in the same authority as follows:

> 'First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return… The Secretary of State of course can and no doubt logically should treat his own view of the merits as 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 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.'

The judicial review test

[15] At the hearing of the judicial review, there was some argument about what test the court should apply when determining the case as between what may be described the "Wednesbury" approach and what the court described as a "substitutional" approach, under which the court could substitute its view for that of the original decision maker. The case law historically had oscillated between the two but there was general agreement that the Wednesbury test is that which has been applied uniformly since the decision of the Court of Appeal of England and Wales in MN (Tanzania) v SSHD [2011] 2 AER 772. The court must therefore apply a rationality standard to the issue of the lawfulness of the conclusion reached by the decision maker in respect of whether the putative fresh claim in this case had a realistic prospect of success before a tribunal.

Realistic prospect of success

[16] The above phrase is referred to in various authorities. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535 Toulson LJ (with whom Ward and Tuckey LJJ agreed) said that "a case which has no reasonable prospect of success…is a case with no more than a fanciful prospect of success". Thus "reasonable prospect of success" means only more than a fanciful prospect of success.

[17] Another formulation is found in ST v SSHD [2012] EWHC 988 Admin where His Honour Judge Anthony Thornton QC, acting as a High Court Judge, said at paragraph [49]:

> 'In deciding whether the claim has a reasonable prospect of success, the decision maker must consider whether he or she considers that the claim has a reasonable prospect of persuading an immigration judge hearing an appeal to allow the appeal from the decision of the same decision maker who has just rejected the fresh representations or submissions.'

Anxious scrutiny

[18] The notion of anxious scrutiny has also been the subject of discussion in the case law. For example, in a recent case, R (Kakar) v SSHD [2015] EWHC 1479 Admin, Foskett J at paragraph [32] referred to ML (Nigeria) [2013] EWCA Civ. 844 in this connection. In that case Moses LJ said:

> 'Of all the hackneyed phrases in the law, few are more frequently deployed in the field of immigration and asylum claims than the requirement to use what is described as 'anxious scrutiny'. Indeed, so familiar and of so little illumination has the phrase become that Carnwath LJ in R (YH) v SSHD [2010] EWCA Civ. 116, between paragraphs [22] and [24], was driven to explain that which he had previously explained namely what it really means. He said that it underlines 'the very special human context

> in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account'. It follows that there can be no confidence that that approach has been taken where a tribunal of fact plainly appears to have taken into account those factors which ought not to have been taken into account.'"

The Further Submissions

[7] As already noted, the further submissions in this case were made in November 2016 after the failure of two applications for leave to remain made by the applicant.

[8] The further submissions in this case are found between pages 68-214 of the bundle before the court. They consist of the following main categories of document:

(i) Application for leave to remain (68-108). While this refers to an application for leave to remain outside the rules, it seems clear that in fact the decision maker considered the application both in accordance with the rules and outside the rules.

(ii) Statement from husband (109-110).

(iii) Bank statement of husband (111-113).

(iv) Information from Electoral Office (114) (118) (144).

(v) General practitioner registration document in applicant's name (115).
Other medical documents in relation to the applicant (116-118), (141-143).

(vi) Tenancy agreement (119-135) in couple's name related to Apartment 5, 43 Cliftonville Road, Belfast.

(vii) Tenancy agreement Flat 2, 57 Cliftonville Road in husband's name (136-140).

(viii) Utility documents (137).

(ix) Documents relating to husband's business – Golden Bowl Chinese Takeaway (145).

(x) Varied photographs (146-148), (156-174).

(xi) Passports (149-155).

(xii) Solicitor's written submissions (209-214) dated 31 October 2016.

Analysis of the above documents

[9] It is clear that the above were considered by the Home Office as is evident from the Home Office's 12 page decision letter in respect of these submissions. The documents relating to her husband, their abode, the husband's takeaway food business and electoral registration appear to have played a part in the Home Office's change of view in relation to the existence between husband and wife of a genuine and subsisting relationship.

[10] The photographs depict a possible family life as they show images of the applicant and her husband and persons who might be:

(a) their children; and

(b) their children's children *i.e.* their grandchildren.

However, it is notable that the material provided in the representations about the children/grandchildren is scant and there are obvious gaps in it. For example, the addresses of the couple's children are not given and no detail is given as to the nature and quality of the relationship which exists between the applicant and her husband and her children/grandchildren.

[11] There is no evidence which has been provided which suggests any serious or significant health difficulty on the part of the applicant's husband. This is important as the applicant's solicitor (page 213) refers to the applicant being "her husband's carer in respect of the long term illnesses he suffers from". In fact, in the husband's statement (page 109) there is no reference at all to him suffering from any significant health deficit or condition or to him being in need of care provided by his wife.

[12] In the application for leave to remain, when asked about whether the applicant and her husband could live together outside the United Kingdom, the only response given was to say that the couple could not leave the United Kingdom as "my partner has a Chinese takeaway business … in Northern Ireland" (page 78). However, under the head of "any other information relevant to the application" there is reference to the applicant's three children (79) (now all adults). There is no reference in the husband's statement of any form of regular contact with the children (109).

[13] The applicant, in the above documents, appears to make the case that she would have no family or friends in China were she to be returned there (see solicitor's letter at page 213). However, this is in conflict with what the Home Office has said about the interviews between the applicant and immigration officials. It is alleged she told them that she had a brother and sister who still reside in China (see

pages 35 and 40). One of the interviews was on 7 June 2016 and the other was on 24 March 2015. When this issue arose at the leave hearing, the court asked about it. In the absence of it being dealt with in the trial bundle, counsel indicated that he would take instructions forthwith. At the end of the hearing he indicated to the court that instructions had been received. These were to the effect that the applicant had at no stage told the Home Office that she had a brother and sister who still resided in China. In view of this development, the court invited the Home Office to provide any evidence that it had by way of interview record to support the Home Office's claims in this respect. In fact, the court received from the Home Office a summary of an immigration interview with the applicant. This clearly was a contemporaneously composed document. It is clear from this document that the applicant told immigration officials that she had a brother and sister in China and that her parents had passed away.

The Home Office's Decision

[14] As noted above, this decision deals with the representations received from the applicant at some length.

[15] The main features of the decision are as follows:

(i) Immigration history.

(ii) A statement of the earlier matters considered.

(iii) A statement of the details of the materials provided by the applicant's solicitor.

(iv) A consideration of the issue of the applicant's family life. It is in this section, at paragraph 21, that the Home Office concedes that the nature of the applicant's and her husband's relationship was genuine and subsisting. Hitherto this had not been conceded.

(v) However, the Home Office rejected the applicant's arguments which relate to the proposition that there would be insurmountable difficulties in relation to her return to China. In the first place, it was noted that the applicant and her husband enjoyed family life in China from at least 1985 to 1998 and, in the case of the applicant, she only left China in 2009. In these circumstances, the Home Office view was that the couple could re-establish life in China as a married couple. Secondly, it was noted by the Home Office that both she and her husband would be familiar with the language, customs and cultures in China. In support of this, the Home Office noted that the husband had obtained a visa valid for China for the period 16 June 2014 until 16 June 2015 and a second visa for China valid from 15 September 2016 to 15 September 2018. It was noted that Mr Shi's passport contained entry and exit stamps for visits to China from 27 January 2015 until 10 March 2015 and from

19 September 2016 to 20 October 2016. In the Home Office's view this showed that Mr Shi had ties to China and that there would not be any difficulties with resettlement there, with the applicant's support. Thirdly, the Home Office rejected the applicant's argument that she would not be able to financially support herself if she were returned to China. It was noted that she had supported herself in the United Kingdom when she arrived here and that during her lengthy period as an over stayer in the United Kingdom she had also been able to support herself. The Home Office view on this point was that no evidence had been provided to demonstrate that the applicant could not continue to support herself if returned to China. Fourthly, the Home Office made the point that if the applicant were to return to China she would nonetheless be able to keep up contact with her children. The same applied to her grandchildren. Modern methods of communication could be used for this purpose. The Home Office also considered that she could apply for appropriate entry clearance should she wish to return to the United Kingdom to visit family members who are settled here. Fifthly, it was not accepted that there would be difficulty in her husband getting any medical assistance he required in China.

[16] Overall the Home Office official dealing with the case was of the opinion that in the light of the applicant's circumstances, including the potential for assistance from family and friends in China, there were not any insurmountable obstacles facing the applicant or her husband should they return to China. The case therefore did not fit within paragraph EX.1 of Appendix FM of the Immigration Rules.

[17] The Home Office also rejected the applicant's submission that she could rely on exceptional circumstances outside the immigration rules for a grant of leave to remain in the United Kingdom on Article 8 grounds. In particular, her claim to be a primary carer for Mr Shi was rejected in the absence of documentary evidence to support it. An extensive discussion of the facts put forward on the applicant's behalf is included at paragraphs 45-50 of the decision letter.

[18] Despite the concession that the applicant and her husband were in a genuine and subsisting relationship, the Home Office view was that the further submissions did not create a realistic prospect of success before an immigration judge. Hence, it did amount to a fresh claim for the purpose of Rule 353.

The court's assessment

[19] The reality of this case appears to be that the applicant's prospects of success before an Immigration Judge are linked to how her case can predictively be judged to fare in the areas of demonstrating that either (i) there are insurmountable obstacles in the way of her husband and her being able to return and establish life together in China or (ii) a return to China would breach her or her husband's Article 8 rights. The decision maker clearly was of the view that there was no realistic prospect that the applicant could succeed before a tribunal in respect of these

matters. The question for this court is, applying anxious scrutiny, is there an arguable case before it that the decision maker, in reaching the conclusion he or she did, had acted irrationally or unreasonably.

[20] It is unnecessary in the leave decision for the court to examine in detail the growing and relatively complex jurisprudence which has grown up around the issues of the interpretation of Appendix FM within the immigration rules and the approach to Article 8 outside the rules. These matters are dealt with at considerable length in such recent decisions as Secretary of State for the Home Department v SS Congo and others [2015] EWCA Civ 387; Singh and Khalid v Secretary of State for the Home Department [2015] EWCA Civ 24; and R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 Admin. These decisions outline effectively the correct approach to a consideration of the sort of issues a leave to remain application of this sort generates. However, as already noted, in this particular case, the plain focus was on paragraph EX.1, in the first place, and, later, the operation of Article 8 outside the rules. The issue of the treatment by the decision maker of the applicant's right to private life was not the subject of critical comment at the leave hearing.

[21] As regards paragraph EX.1, which as noted earlier deals with the issue of family ties, the relevant test which applies to a case like this, where the applicant has breached the immigration rules over a prolonged period as a result of over-staying, is found at sub-paragraph 2(b). This applies where the applicant has a genuine and subsisting relationship with a partner (which includes a spouse) who is in the United Kingdom and is a British citizen. That is this case as Mr Shi has been living in the United Kingdom for some time and is now a naturalised British citizen. In these circumstances there is a door which may be open to the applicant but only if she can show that "there are insurmountable obstacles to family life with that partner continuing outside the United Kingdom".

[22] It appears to the court that the Home Office decision maker was acting lawfully when she viewed the question as being whether there were insurmountable obstacles to the husband and wife returning to China.

[23] The term "insurmountable obstacles" is defined within paragraph EX.1. It states that it is referring to "very significant difficulties which would be faced by the applicant or her partner being able to live together outside the United Kingdom and which could not be overcome or would entail very serious hardship for the applicant or [her] partner". The test has been described as imposing "a high hurdle" (see paragraph [21] of the decision of the England and Wales Court of Appeal in R (Agyarko) and others v Secretary of State for the Home Department [2015] EWCA Civ 440[1]). The phrase is derived from Strasbourg jurisprudence: see paragraph [22] *ibid* where there is reference to it being the formulation of a stringent test. It is also

[1] It has come to the court's attention since writing this judgment that the Court of Appeal's decision in this case has been affirmed by the Supreme Court: see [2017] UKSC 11.

well established that Article 8 cannot be considered as imposing on the state a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory (see, for example, the decision of the Grand Chamber of the European Court of Human Rights in Jeunesse v The Netherlands (2015) 60 EHRR 17 at paragraphs 107-108).

[24] The decision maker did not consider that the applicant would have a realistic prospect of success before an immigration tribunal that this test would be fulfilled in this case. The decision maker's reasons, in substance, have been referred to above.

[25] In the court's view, it cannot be said that the decision maker's conclusion was arguably unreasonable or irrational. The evidence to bring home a case of the existence of insurmountable obstacles simply was not there. Both the applicant and her husband are mature individuals. Both had spent most of their lives in China. Both speak Chinese. There was no convincing reason to suggest that they could not re-adapt to live in China. There was evidence that the applicant had siblings in China. She had told this to immigration officials. Mr Shi appears in recent times to have spent considerable time in China. This suggests that he had business or, alternatively, family interests there. The case that he could not on medical grounds travel to China appears to the court to be fanciful. The same can be said of the case that the applicant was her husband's carer. In any event, medical services were and are available in China. There is no reason to believe that either the applicant or her husband could not work or establish a business in China. It was a tenable view on the part of the decision maker that a tribunal would lack evidence in this case which could support the conclusion that the couple would face very significant difficulties or very serious hardship if they were to return to China. Insofar as the applicant's case was based on the presence of her children (or grandchildren) in the United Kingdom, the decision maker had pointed out that contact could be kept up through visits and *via* modern technology. While this might involve some inconvenience, this was not of a sort which would reach the intensity of an insurmountable obstacle which could generate a realistic prospect of success before a tribunal.

[26] Turning to the question of breach of Article 8 outside the immigration rules in this case, it is important to appreciate the role of the immigration rules in this area. The rules had been re-written to try to specify relevant factors in more detail than before based on domestic and Strasbourg case law. In the great bulk of cases the hope had been that it would be unnecessary to stray outside the factors considered in the rules. However, it remained the case that where a claim failed in terms of the rules, the question of breach of Article 8 could still be considered outside the rules.

[27] Reviewing the position in 2013 Sales J (as he then was) said (at paragraph [29]) of his judgment in Nagre:

> "…the new rules do provide better explicit coverage of the factors identified in case-law as relevant to analysis of

claims under Article 8 than was formerly the position, so in many cases the main points for consideration in relation to Article 8 will be addressed by decision makers applying the new rules. It is only if, after doing that, there remains an arguable case that there may be good grounds for granting leave to remain outside the Rules by reference to Article 8 that it will be necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under the new rules to require the grant of such leave".

[28] In guidance provided by the Secretary of State in respect of the approach to be applied in deciding whether to grant leave to remain outside the rules, it has been stated as follows (quoted in Nagre at paragraph [13]):

"**3.2.7d Exceptional Circumstances**

Where the applicant does not meet the requirements of the rules refusal of the application will normally be appropriate. However, leave can be granted outside the rules where exceptional circumstances apply. Consideration of exceptional circumstances applies to applications for leave to remain and leave to enter. "Exceptional" does not mean "unusual" or "unique". Whilst all cases are to some extent unique, those unique factors do not generally render them exceptional. For example, a case is not exceptional just because the criteria set out in EX.1 of Appendix FM have been missed by a small margin. Instead, "exceptional" means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. This is likely to be the case only very rarely.

In determining whether there are exceptional circumstances, the decision maker must consider all relevant factors, such as:

(a) The circumstances around the applicant's entry to the UK and the proportion of the time they have been in the UK legally as opposed to illegally. Did they form their relationship with their partner at a time when they had no immigration status or this was precarious? Family life which involves the [applicant] putting down roots in the UK in the

> full knowledge that their stay here is unlawful or precarious should be given less weight, when balanced against the factors weighting in favour of removal, than family life formed by a person lawfully present in the UK.
>
> (b) Cumulative factors should be considered. For example, where the applicant has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although under the rules family life and private life are considered separately, when considering whether there are exceptional circumstances private and family life can be taken into account.
>
> If the applicant falls to be granted because exceptional circumstances apply in their case, they may be granted leave outside the rules for a period of 30 months and on a 10 year route to settlement".

[29] Sales J said of the above guidance in Nagre (at paragraph [14]) that:

> "The definition of "exceptional circumstances" which is given in this guidance equates such circumstances with there being unjustifiable hardship involved in removal such that it would be disproportionate – *i.e.* would involve a breach of Article 8".

[30] In the present case while the applicant and Mr Shi married in China and must have contracted their relationship at that time before either arrived in the United Kingdom, the applicant's time in the United Kingdom has predominantly been as a person who has overstayed and whose stay has been precarious and unlawful. This is a significant factor. It is also the case that, apart from the claim already discussed about her relationship with her children and their children in the United Kingdom, there is scant evidence in the papers of her having a developed private life in the United Kingdom to any substantial degree.

[31] The Home Office decision maker was clearly of the view that the applicant's case did not bear any realistic prospect of success before a Tribunal in the context of an alleged breach of Article 8 outside the rules, her claim in this regard having been unsuccessful within the rules. The court cannot view as arguable that this finding in this case was unlawful as being unreasonable or irrational. The court respectfully agrees with Sales J's summation at paragraph [43] of Nagre where he said that "in the majority of cases, if the applicant for leave to remain cannot show that there are insurmountable obstacles to relocation of a spouse or partner to his or her country of

origin so as to meet that part of the test laid down in EX.1(b), they will not be able to show that their removal is disproportionate". That, in the court's judgment, is the position here.

Conclusion

[32] In all the circumstances of this case and approaching this case with anxious scrutiny, the court is not persuaded that this is a case where it is arguable that the decision maker has acted unreasonably in arriving at his/her conclusion that the applicant's case did not reach the standard of demonstrating a reasonable prospect of success before an immigration Judge.

[33] In these circumstances, for the reasons given, the court refuses leave to apply for judicial review.