Neutral Citation No: [2017] NIQB 92 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McC10434** *Delivered*: **20 October 2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH (DIVISION)

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HUAYING ZHANG

Applicant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

_____

MCCLOSKEY J

Introduction

[1] By this application for judicial review the Applicant, a citizen of the Peoples' Republic of China, challenges a decision of the Respondent, the Secretary of State for the Home Department (the "Secretary of State"), made under the aegis of paragraph 353 of the Immigration Rules, which provides:

> "…. *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 had previously been considered. The submissions will only be significantly different if the content:*
>
> *(i) has not already been considered; and*
>
> *taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection ….*"

In short, by its initial decision dated 03 November 2014 the Secretary of State rejected the Applicant's asylum claim, simultaneously dismissing her separate claim that she

had been a victim of trafficking. The Applicant's representatives having made further representations, the Secretary of State, by the terms of the impugned decision, which is dated 10 October 2016, purported to give effect to paragraph 353 of the Rules and concluded that there was no fresh claim.

The Applicant's Claim

[2] The essence of the Applicant's asylum claim in 2014 was an asserted fear of ill treatment in the event of being repatriated to China because, she claimed, her father had killed a policeman there. This claim was rejected as lacking in credibility. Simultaneously, the Secretary of State gave consideration to the Chinese Family Planning ("CFP") Scheme and its possible implications for the Applicant and her child, concluding that she would not be at risk of forced sterilisation.

[3] The Applicant's further representations, which generated the decision impugned in these proceedings, differed markedly from the case she had previously advanced in claiming asylum. She did not attempt to maintain her asylum claim. Rather, she now advanced a protection claim. The further representations, compiled by her solicitor, made the case (in summary) that as her child was illegitimate, the Applicant had contravened the CFP Scheme; therefore, upon returning to China she would be liable to a fine of some £10,000; she would have no access to State benefits; and her child would be deprived of State health care and education because registration would be prohibited until the fine was paid; and (by implication) she would find herself alone and without any kind of family support. She contended that her predicted living conditions and circumstances would amount to degrading treatment contrary to Article 3 ECHR, giving rise to a breach of the Secretary of State's duty under section 6 of the Human Rights Act 1998. Pausing, the Applicant's case in this Court is that all of the ingredients of her aforementioned further submissions to the Secretary of State were new.

The Legal Test

[4] I have reproduced in [1] above paragraph 353 of the Rules. The first question for the decision maker is whether there is fresh material not previously considered. This, unarguably, invites a response in the Applicant's favour. Mr Henry, on behalf of the Respondent, sensibly and correctly did not advance any contrary contention. This in turn triggers the second question, namely whether the whole of the material creates a realistic prospect of succeeding in an appeal to the First-tier Tribunal ("FtT").

[5] The legal test to be applied in the judicial exercise of reviewing the legality of a decision of this kind is well established. In WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495, the Court of Appeal stated:

> "[10] …. *Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of*

> *anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters. …*
>
> *[11] First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §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."*

In some of the decided cases a realistic prospect of a successful appeal to the tribunal is sometimes described as one which is more than fanciful.

[6] From the authorities I distil the following principles:

(i) while the test is that of Wednesbury irrationality, there is a significant qualification, or calibration, namely that in this context the legal barometer of irrationality is that of anxious scrutiny.

(ii) A reviewing court must pose the two questions formulated in [11] of WM.

(iii) A reviewing court is not necessarily precluded from applying other recognised kindred public law tests. This is reinforced by the dominance and import of the anxious scrutiny criterion.

(iv) The Secretary of State is perfectly entitled to form a view of the merits of the material put forward: however, this is a mere starting point, since the exercise differs markedly from one in which the Secretary of State makes up his (or her) own mind.

(v) The overarching test is that of anxious scrutiny.

The Impugned Decision

[7] The Applicant's further submissions generated a second decision of the Secretary of State (that under challenge) which yields the following analysis. First, the decision maker incorrectly characterised the Applicant's further submissions as, *inter alia*, invoking Article 8 ECHR:

> "*Below is a summary of your further submissions:*
>
> - *You cannot return to China due to the One Child Policy situation.*
>
> - *You and your child's Article 8 rights of the* [sic] *ECHR will be breached if returned to China due to the family/private life you have developed in the UK.*"

The first of these two quoted formulations is a woeful summary of the centrepiece of the Applicant's new case, to the point of being unintelligible, while the second constitutes an egregious error. Its dimensions are so fundamental as to invite the assessment that the decision maker either failed to read the Applicant's further representations or hopelessly misunderstood them.

[8] Next, the decision maker, again failing to engage with the Applicant's case, devoted considerable space and energy to examining, and ultimately dismissing, any risk of sterilisation to which the Applicant might be exposed. In so doing the decision maker suggested that the Applicant was again advancing the case that she could not return to China as she had a child born out of wedlock. This was stated and repeated. However, the Applicant's further representations, emphatically, did not attempt to make this case. Indeed, an asserted fear of sterilisation had never formed any part of her case.

[9] In the same passages the decision maker purported to address the discrete issue of exposure to payment of a fine upon returning to the Fujian Provence. No attempt was made to engage with the Applicant's written representations on this issue. Even worse, the decision maker quoted from a source which was said to justify the conclusion that the Applicant would not be required to pay any fine (the Family Planning Regulation itself) which is to precisely the opposite effect. The error could not have been more fundamental.

[10] The suggestion in the decision letter that the Applicant had provided no objective evidence to support her claim that she could not return to China due to the one child policy invites the immediate observation that there is no recognition of the Article 3 ECHR basis of the Applicant's further case. Secondly, this assertion is contradicted by the following:

(a) The further submissions included objective statistical data about the likely level of the expected fine.

(b) The Population and Family Planning Regulation of Fujian Province (which the decision maker actually invoked).

(c) The US Department of State's Country Report on Human Rights Practices of 2014 (*ditto*).

(d) The sources quoted in the Home Office Country Information and Guidance Publication of July 2015 (the "CIG"): see particularly paragraphs 5.6.1 – 5.7.6.

All of the sources quoted, with one exception (paragraph 5.7.5 of the CIG) contradict the decision maker's assessment.

[11] The second riposte to this aspect of the decision is that it is confounded by the operative County Guidance decision of the Upper Tribunal (Immigration and Asylum Chamber), AX (Family Planning Scheme) China CG [2012] UKUT 00097 (IAC). There the Upper Tribunal, promulgating general guidance on the predictable impact and effect of the Chinese Family Planning Scheme on returning Chinese citizens, the cornerstone of the system being that child birth in China is regulated by the State, decided, *inter alia*, that the State expects child birth to occur within marriage; enhanced state benefits are payable to "one child" parents for their lifetimes; conversely, "two child" parents suffer a major loss of State benefits; children born out of wedlock are classified "*unauthorised*"; the registration of their births requires the payment of a "social upbringing charge", a financial penalty which is calculated with reference to income; and where there is an "*unauthorised*" child both parent and child are vulnerable to significant disadvantages, in particular reduced state funded health care, diminished state education and work discrimination.

[12] The Upper Tribunal also specifically addressed the issue of Article 3 ECHR, holding (per paragraph 9 of the headnote):

> *"The financial consequences for a family losing its SCP* [the enhanced State Benefits Certificate] (for having more than one child) *and/or of having SUC** imposed* (for having unauthorised children) *and/or suffering disadvantages in terms of access to education, medical treatment, loss of employment, detriment to future employment etc will not* ***in general*** *reach the severity threshold to amount to persecution or serious harm or treatment in breach of Article 3."*
>
> [Emphasis added.** the financial penalty]

I am satisfied that AX, considered as a whole, decided that the registration of every unauthorised child in China requires payment of the "SUC". While the Upper

Tribunal also addressed the issue of the affordability of the SUC, it did so by reference to couples and, further, found that couples would in general be able to afford it: see [188] in particular. That the main focus of the Tribunal's decision was married couples is unsurprising, having regard to the circumstances of the Appellant and her husband: see [3].

[13] In another decision, HC and RC (Trafficked Women) China CG [2009] UK AIT 00027, the Upper Tribunal promulgated general guidance on the risks to which trafficked Chinese women would be exposed upon return to their country of origin. I am satisfied that HC and RC does not promulgate any general guidance of relevance to the present case. Insofar as the arguments of either party place any reliance on this decision I reject them.

[14] While I accept that one aspect of the general guidance contained in HC and RC is that, pursuant to the Chinese state obligation to house the homeless and protect its citizens from starvation, a returning trafficked woman without family support would not become homeless or destitute, the Applicant's characteristics are different: she is the unmarried mother of a child born out of wedlock. Moreover, the evidence underpinning this discrete holding of the Upper Tribunal is now of some ten years vintage and must be balanced with more recent evidence, in particular that of the Chinese Central Television (the main State television broadcaster) which, in January 2016, reported the phenomenon of homeless street children, most of whom suffered this predicament "*… for being born illegitimately or because of the State's previous one child policy ….*". This evidence also records the exclusion of such children from social benefits such as education. Linked to this is the evidence pertaining to the possibility of the Applicant being exposed to a fine entailing a crippling and possibly unattainable burden: this is addressed in [146] of AX. This is to be considered in conjunction with [78] of HC and RC which recognises the mere possibility of waiver of fine in the case of a person without means.

[15] I return to the impugned decision. Its next eye catching feature is the sentence:

> "*You have provided no evidence that you or wife will be specifically subjected to persecution on return to China.*"

While this sentence is nigh unintelligible by reason of its grammatical flaws, it invites the brief analysis that the Applicant, who is of female gender, has no "*wife*" and provided no evidence to the contrary and, as already highlighted, her further submissions had no persecution dimension. The decision maker then devoted substantial space to considering the non-existent Article 8 ECHR case. This was followed by a purported consideration of the child's best interests which can only be described as perfunctory and formulaic fundamentally on account of its abject failure to recognise the Article 3 ECHR degrading treatment case being made by the Applicant.

[16] Having regard to the applicable principles, it is inevitable that decision letters

in a case of this kind will be meticulously analysed by the court. This is a reflection of the judicial duty in play. Decisions belonging to this sphere are not to be read with a broad sweep. Rather, they require to be dismantled with some care. The "*in bonam partem*" principle has little role in this context as it is antithetical to anxious scrutiny. While every decision must, of course, be considered as a whole, there will inevitably be some compartmentalisation in the analysis, given the issue by issue approach which characterises the better – but sadly not all - decisions of this *genre*.

Conclusions and Disposal

[17] As is clear from the above, the impugned decision of the Secretary of State does not withstand an orthodox public law analysis. Fundamentally it is infected by a mis-characterisation and misunderstanding of the Applicant's new case, a failure to consider - properly or at all – various pieces of relevant evidence and a failure to correctly appreciate and give effect to the decision in AX. Several defects of undeniable significance in the impugned decision are readily demonstrable. While the case law to date has not – at any rate explicitly – recognised that a decision of this *genre* may be quashed on the basis of public law misdemeanours other than irrationality, the erection of this seemingly elevated threshold is tempered by, firstly, the terms in which it has been consistently expressed in the decided cases and, secondly, the consistent emphasis on the requirement of anxious scrutiny. The rationale of this emphasis is, of course, that in every asylum claim and in many human rights claims the stakes are high, having regard to the possibly severe consequences for the returning foreign national.

[18] As the exercise in analysis which I have carried out amply demonstrates, the impugned decision is replete with grave misunderstandings and errors. In a context requiring the application of the elevated standard of anxious scrutiny, it does not begin to pass muster. The conclusion that anxious scrutiny was not brought to bear in the exercise of considering the Applicant's further representations follows inexorably.

[19] While this might ultimately prove to be a far from one-sided case, having regard not least to the general rule concerning Article 3 ECHR promulgated in AX, the vintage of that decision and the evidence which it considered will have to be weighed. The valiant submissions of Mr Henry threw into sharp relief the quite different functions of this Court of supervisory jurisdiction and the FtT. Ultimately, the sole question for this Court – which I have answered - is whether the Secretary of State erred in law within the compass of the principles formulated in WM (DRC) and a series of other Court of Appeal decisions.

[20] The appropriate remedy is an order of certiorari quashing the impugned decision of the Secretary of State. This will require an exercise of reconsideration and remaking the decision, duly guided and enlightened by the judgment of this Court. This will entail considering any further representations on behalf of the Applicant. The Secretary of State may well consider that the appropriate course is to determine that there is no sustainable basis for applying the bar enshrined in paragraph 353,

with the result that the arbiter of the Applicant's case will be the judiciary – the FtT – and not the executive.

Order

[21] I order that the impugned decision of the Secretary of State be quashed. The Respondent will pay the Applicant's costs, to be taxed in default of agreement. The Applicant's costs will be taxed as an assisted person.

Footnote

[22] It would be remiss of the Court to fail to acknowledge the high quality of the skeleton arguments of the parties' counsel. These were instrumental in ensuring that a compact and focused hearing was possible thereby furthering the overriding objective.