



**Upper Tribunal  
(Immigration and Asylum Chamber) Appeal Number: AA/02374/2013**

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 2<sup>nd</sup> December, 2014  
Signed 16<sup>th</sup> December, 2014**

**Determination Promulgated  
On 18<sup>th</sup> December 2014**

**Before**

**Upper Tribunal Judge Chalkley**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**JING SONG XUE**

Respondent

***Representation:***

*For the Appellant: Mrs Johnson, Home Office Presenting Officer*

*For the Respondent: Mr Singh, a representative of Greater Manchester  
Immigration Aid Unit*

**DETERMINATION AND REASONS**

1. In this appeal the Secretary of State for the Home Department is the appellant, but to avoid confusion I shall refer to her as, "the claimant".
2. The respondent is a citizen of the People's Republic of China, who was born on 24<sup>th</sup> March, 1981.

### **Immigration History**

3. The respondent claims that with the assistance of an agent he left China in 2002, by coach and travelled overland to Western Europe through various unknown countries. He arrived at Bristol Airport on 20<sup>th</sup> March, 2012, on a flight from Amsterdam and claimed asylum on arrival following which he was granted temporary admission.
4. On 1<sup>st</sup> February, 2013, the claimant issued to the respondent a notice of immigration decision refusing to grant leave to the respondent and indicating her proposal to issue directions for the respondent's removal to China following the refusal of his asylum and human rights claims.

### **Appeal to the First-tier Tribunal**

5. The respondent appealed to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Levin on 30<sup>th</sup> July, 2013, in Manchester. The judge dismissed the respondent's appeal on asylum grounds and on humanitarian protection grounds and human rights grounds. However, the judge believed that the claimant's decision was not in accordance with the law and purported to direct that the claimant reconsiders the respondent's case, "*having regard to her policy set out in chapter 53 of her EIG*".
6. At paragraph 68 of his determination the judge found that the claimant in her Reasons for Refusal Letter made no reference to chapter 53 or to her policy upon legacy cases. He said:-

"It is therefore necessary for me to consider and determine whether the [respondent's] case falls within the category of being a legacy case. In considering this issue I have had regard to the judgment of Mr Justice Burton in the case of *Hakemi and Others v Secretary of State for the Home Department* [2012] EWHC 1967 (Admin) and which concerns so-called 'Legacy cases'."

7. The judge noted that the Reasons for Refusal Letter written by the claimant dated 17<sup>th</sup> September, 2012, is stated to have been written by the Case Assurance and Audit Unit having regard to the fact that the respondent's asylum application was almost ten years old at that time. The judge found that the respondent's case fell within the category of being a "legacy case" and also found that the claimant had failed to consider and have regard to chapter 53 of the Enforcement Instructions and Guidance before reaching a decision in the respondent's case. This, the judge said, was not a formality in the respondent's case given that he had been in the United Kingdom for ten years, was in a relationship with Ms C akin to marriage and that the couple have two children born in the United Kingdom. The judge allowed the respondent's

appeal to the limited extent that it was otherwise not in accordance with the law and directed that the claimant reconsiders the respondent's claim having regard to chapter 53 of EIG.

8. The claimant has challenged the determination of Judge Levin, pointing out that he had failed to consider *AZ (Asylum - "legacy" cases) Afghanistan* [2013] UKUT 00270 (IAC) where it was found that where an applicant in an asylum appeal has previously been informed that his case is being considered as a "legacy case" but no decision under the process had been made, a subsequent immigration decision following a rejection by the Secretary of State of his asylum claim is not rendered unlawful by reason of a failure to make a decision under the legacy process. Permission to appeal was granted following which the respondent's representatives submitted a lengthy response.
9. I need not refer to the response because I was advised by Mr Singh that he was not relying on it.
10. Mrs Johnson told me that the judge was correct to deal with the asylum and human rights appeals, but he should not have gone on to allow the appeal on the basis that the decision was not in accordance with the law. because he failed to have regard to AZ. She pointed out that the judge had allowed the appeal because the Home Office had not considered the legacy and chapter 53.
11. For the respondent, Mr Singh told me that AZ did not deal with chapter 53. He relied on the decision in *Mohammed*. He took me to paragraphs 76 and 78 of *Mohammed* and suggested that where chapter 53 guidance was not taken into account and in particular what he said there about the length of residence, then that amounts to a failure to apply relevant policy and a failure to take account of relevant consideration renders the decision *Wednesbury* unreasonable and otherwise unfair. Mr Singh submitted that since chapter 53 had not been referred to in the Secretary of State's letter, the appellant's length of residence in the United Kingdom has not been considered and for the reasons given in *Mohammed* that amounted to an error of law.
12. Responding briefly, Mrs Johnson pointed out that at paragraph 26 of the Secretary of State's Reasons for Refusal Letter of 17<sup>th</sup> September, 2012 the Secretary of State has expressly pointed out that consideration had been given as to whether or not the respondent should benefit from the grant of leave to remain based on the length of his residence, but for reasons indicated had concluded that it did not. She submitted that the factors set out in paragraph 53 had been considered but the decision in *Mohammed* was not on all fours with the decision in this appeal. In this case

the respondent's claim was not resolved until the decision of the Secretary of State in 2013 to refuse asylum. It is asserted that the Secretary of State's decision in this appeal is unlawful because the Secretary of State had not considered the factors under chapter 53, but in fact those factors had been considered. The judge erred by failing at paragraph 68 of his determination to recognise that those matters had been dealt with.

13. I reserved my decision.

14. Chapter 53.1.1 of the Secretary of State's Enforcement Instructions and Guidance set out the relevant factors but make it clear that the list is not exhaustive. It says:-

**"53.1.1 Exceptional Circumstances**

**Relevant Factors**

Relevant factors are set out below, but this list is not exhaustive.

The consideration of relevant factors needs to be taken as a whole rather than individually

When determining whether or not exceptional circumstances exist, consideration of the relevant factors in 353B needs to be taken as a whole. Discretion not to remove on the basis of exceptional circumstances will not be exercised on the basis of one factor alone.

**(i) Character, conduct and associations including any previous criminal record and the nature of any offence of which the applicant has been convicted**

When considering an individual's character and conduct, regard must be given to whether;

There is evidence of criminality that meets the Criminal Casework Directorate (CCD) threshold; or The individual has been convicted of a particularly serious crime (below the CCD threshold) involving violence, a sexual offence, offences against children or a serious drug offence; or There are serious reasons for considering that the individual falls within the asylum exclusion clauses; or It is considered undesirable to permit the individual to remain in the UK in light of exceptional circumstances, or in light of their character, conduct or associations, or the fact that they represent a threat to national security.

Evidence of criminality or conduct meeting the criteria above will normally mean that an individual cannot benefit from exceptional circumstances

**(ii) Compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable**

Where there is evidence of an attempt by the individual to delay or frustrate the decision making process, frustrate removal, or otherwise not comply with any requirements imposed upon them, then this will weigh against the individual

Caseworkers must also take account of Evidence of deception practised at any stage in the process;

Failure to attend interviews as requested;

Failure to supply information as requested (e.g. for re-documentation) ;

Failure to comply with reporting conditions;

Whether they have worked illegally;

Any other type of fraud or deception, such as benefit fraud or NHS debt;

An individual's lawful employment history and how they have supported themselves and/or their family;

A sustained history of compliance with every requirement the Home Office has made of them, including providing full information in their application, attending, interviews, compliance with reporting requirements

Case workers must assess all evidence of compliance and non-compliance in the round, but repeated non-compliance and/or lengthy periods of absconding will generally mean that an individual cannot benefit from exceptional circumstances, unless there are strong countervailing reasons in their favour.

**(iii) Length of time in the United Kingdom accrued for reasons beyond the migrant's control after their human rights or asylum claim has been submitted or refused;**

The length of residence in the UK is a factor to be considered where residence has been accrued by an unreasonable delay which is not attributable to the migrant. Periods of residence which are caused by actions of non-compliance attributable to the migrant will not count in the migrant's favour. More weight should be attached to the length of time a child has spent in the UK compared to an adult. Provided that the factors outlined in "Character" or "Compliance" do not weigh against the individual, then case workers should also consider where there has been significant delay by the Home Office, not attributable to the migrant, in deciding a valid application for leave to remain on asylum or human rights grounds or where there are reasons beyond the individual's control why they could not leave the UK after their application was refused. For example: Family" cases where delay by the Home Office, or factors preventing departure, have contributed to a significant period of residence (for the purposes of this guidance, „family" cases means parent as defined in the Immigration Rules and children who are emotionally and financially dependent on the parent, and under the age of 18 at the date of the decision). Following an individual assessment of the prospect of enforcing removal, and where the factors outlined in "Character" and "Compliance" do not weight against the individual, family cases may be also be considered exceptionally on grounds of delay where the dependent child has lived in the UK for more than 3 years or more whilst under the age of 18. Any other case where the length of delay by the Home Office in deciding the application, or where there were factors preventing departure, the case worker following an individual assessment of the prospect of enforcing removal and where the factors outlined in "Character" and "Compliance" do not weight against the individual, concludes that the person will have been in the UK for more than 6 years.

**(iv) Any representations received on the persons behalf;**

These must always be considered and given due weight. Individuals may raise other relevant factors not listed above. These should be fully considered on a case-by-case basis."

15. Paragraph 53.1.2 makes it clear that if, having considered the factors set out in 53.1.1 above, removal is no longer considered appropriate then discretionary leave to remain should be granted.

16. Paragraphs 26 and 27 of the Secretary of State's Reasons for Refusal Letter of 17<sup>th</sup> September, 2012, say this:-

"26. Consideration has been given to whether you should benefit from a grant of leave to remain based on your length of residence in the United Kingdom but it is not considered that it is sufficiently compelling to grant you leave and it is noted that you absconded for seven years and as such you should not benefit from a grant of leave to remain. Your ties to the UK have been considered but they are not considered extensive or strong enough to suggest that you should benefit from a grant of leave. It is noted that you state that you supported yourself in

the United Kingdom by selling DVDs (AIR Q111). It is to be noted that, for the past nine years, you have not had permission to work and thus any employment that has been taken up has been done so illegally. It is also to be noted that anyone employing you is guilty of an offence and could face prosecution. Illegal working deprives the tax system and thus the British economy of vast amounts of money each year. In addition, there are skilled people within the employment pool who have been deprived of income because of illegal working, therefore it is not accepted that you should benefit from the grant of leave.

27. In the light of all the evidence available, it has been concluded that you have not established a well-founded fear of persecution and that you do not qualify for asylum. Your asylum claim is therefore refused under paragraph 336 of HC 359 (as amended). It has been concluded that you have not shown that there are substantial grounds for believing that you face a real risk of serious harm on return from the UK and that you do not qualify for humanitarian protection. Therefore your application has been refused under paragraph 339F of the Immigration Rules. Your application has been recorded as determined on 13/9/12."
17. It is not, of course, suggested that the appellant has any criminal record or has been convicted of any criminal offence in the United Kingdom.
18. In AZ the Tribunal found that where an appellant in an asylum appeal had previously been informed that his case was being considered as a "legacy case", but no decision under the process had been made, a subsequent immigration decision following rejection by the Secretary of State of his asylum claim is not rendered unlawful by reason of the failure to make a decision under the legacy process. It also makes it clear that there is no obligation on a Tribunal to adjourn an appeal so as to allow for the decision to be made under the legacy process.
19. In the case of this appellant the Secretary of State had considered the matters required to be considered by chapter 53.1.1 of the Enforcement Instructions and Guidance. Paragraph 26 of the respondent's letter of 17 September, 2012 deals specifically with the appellant's length of residence and whether or not he should be granted leave to remain on the basis of it. Paragraph (ii) makes it clear that where there is evidence of an attempt by an individual to delay or frustrate the decision making process this will weigh against the individual and in this instance the appellant had absconded for a period of seven years. That was taken into account as required by Enforcement Instructions and Guidance.
20. For all these reasons I have concluded that the making of the decision by First-tier Tribunal Judge Levin that the respondent's decision was not in accordance with the law involved the making of an error on a point of law. There was no error on the part of the respondent, since she had already considered the appellant's case having regard to chapter 53 of the Enforcement Instructions and Guidance.
21. To that extent the First-tier Tribunal Judge erred. However, the judge's decision in respect of the appellant's asylum appeal,

humanitarian protection and human rights appeal have not been challenged and shall stand.

**Richard Chalkley**  
**Upper Tribunal Judge Chalkley**