R (on the application of Huang & others) v Secretary of State for the Home Department ("No Time Limit" Transfer: Fraud) IJR [2015] UKUT 00662 (IAC)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2015

Before:

MR JUSTICE COLLINS

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Between:

(1) Meilin Huang
(2) Shumel Zhun
(3) Xian Fa Pan
(4) Meiying Yu
(5) Aiqing Lin

Applicants

- and –

-

Secretary of State for the Home Department **Respondent**

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Mr Danny Bazini (instructed by **David Tang & Co**) for the **1st applicant**
Mr Ramby de Mello (instructed by **David Tang & Co**) for the **other applicants**
Miss Julie Anderson (instructed by **Treasury Solicitor)** for the **respondent**

1. The Upper Tribunal has jurisdiction to determine a claim challenging a decision not to transfer a "No Time Limit" (NTL) vignette to a person's new travel document.
2. In cases where a decision of that sort is said to be motivated by a perception that the person obtained leave by deception, the Secretary of State should rely on the process available to her for cancelling leave.

Hearing dates: 14th October 2015

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Approved Judgment

Mr Justice Collins:

1. These claims were lodged in the Upper Tribunal (Immigration and Asylum Chamber) (UT(IAC)). Upper Tribunal Judge Andrew Jordan directed that the case of Huang should be transferred to the Administrative Court on the ground that it did not fall within the direction of the Lord Chief Justice made pursuant to Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and section 18 of the Tribunals, Courts and Enforcement Act 2007. The other claims were transferred since they dealt with the same matter. They have no direct connection but since each challenges an identical decision made by the respondent they have been heard together.

2. Each claim challenges the refusal of the respondent to transfer what is labelled a "No Time Limit" (NTL) stamp from the applicants' immigration status documents, to his or her passport and to issue a Biometric Residence Permit. Each applicant is a Chinese national who came to this country and claimed asylum. Zhou made her claim in 2006. The other applicants made their claims, in the case of Pan in 1998 and the other three in 2000 or 2001. In each case asylum was refused and any appeal was unsuccessful but the applicants did not leave the country. In due course they made requests to be considered pursuant to the legacy arrangements and in these cases were granted indefinite leave to remain (ILR).

3. Each applicant failed to give correct details when seeking asylum and in their requests for leave pursuant to the legacy policy. In each case dates of birth were inaccurate and in one (Lin) an incorrect identity was used. In some there were also differences in that the forenames were split into two separate words. But that in my view is probably of no importance, since the Chinese characters can when given their equivalent Western letters be put down as one or two words, and it cannot sensibly be said that that on its own was a deliberate error made to mislead. The Chinese authorities will have the correct details of an individual and so will not accept the return of one who does not have those details. Thus the giving of false dates of birth or other details will mean that it is impossible to return that individual if asylum is refused. There are of course other important concerns that false details must not be given since such conduct undermines proper immigration control and ensuring that those seeking entry have no criminal records or might otherwise be a danger to the state so that there is a public interest in excluding them.

4. In order to decide whether the UT(IAC) has jurisdiction it is necessary to set out the statutory provisions which deal with the provision of a NTL stamp. Section 5 of the UK Borders Act 2007 enables regulations to be made by the respondent 'requiring a person subject to immigration control to apply for the issue of a document recording biometric information'. This is called a biometric information document. Such document may by the regulations be required to be used (s.5(2)(b)):-

   "(i) for specified immigration purposes

   (ii) in connection with specified immigration procedures, or

(iii) in specified circumstances, where a question arises about a persons status in relation to nationality or immigration".

5. The relevant regulations are the Immigration (Biometric Registration) Regulations 2008 (SI 2008/3048) as amended. The requirement to apply for a biometric immigration document (BID) is imposed by regulation 3. Paragraph 3(1)(a) covers a person subject to immigration control. He or she must apply for a BID if he or she satisfies a condition which includes (regulation 3(2)(c) or (d)) – an application:-

> "(c) to replace a stamp, sticker or other attachment to a passport or other document which indicated that he had been granted limited or indefinite leave to enter or remain in the United Kingdom
>
> (d) to replace a letter which indicated that he had been granted limited or indefinite leave to enter or remain in the United Kingdom".

Regulation 21 requires the holder of the document to produce it to an immigration officer *inter alia* on seeking entry to the U.K.

6. Each of the applicants in these cases applied for the transfer of the NTL stamp from the document given on grant of ILR. This was needed because their passports recorded details which were not the same as had been used to obtain ILR. This meant that they would not be able to travel since they would be likely not to be allowed into the country since their passports would apparently show a different identity to the one given ILR.

7. Section 31A of the Senior Courts Act 1981, which was inserted by s.19(1) of the Tribunals, Courts and Enforcement Act 2007, provides so far as material that an application for judicial review made to the High Court must be transferred to the Upper Tribunal if three conditions are met. The first two, which are met, are that nothing more than usual relief granted to a successful applicant for judicial review including damages is applied for and that the claim does not call into question anything done by the Crown Court. Condition 3 is material in these cases. Section 31A(6) provides:-

> "Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007".

If conditions 1 and 2 are fulfilled but condition 3 is not transfer may be ordered by the Administrative Court if it appears to be just and convenient to do so.

8. The relevant direction was made by Lord Judge, CJ on 21 August 2013. So far as material it provides:-

> "1……[T]he Lord Chief Justice hereby specifies the following classes of cases for the purposes of section 18(6) of the [2007 Act]
>
> Any application for permission to apply for judicial review and any application for judicial review (including any application for ancillary relief and costs in such applications) that calls into question:

- a decision made under the immigration acts (as referred to in schedule 1 to the Interpretation Act 1978) or any instrument having effect (whether wholly or partly) under an enactment within the Immigration Acts, or otherwise relating to leave to enter or remain in the United Kingdom outside the immigration rules….

4. In paragraph 1….above references to a decision include references to any omission or failure to make a decision".

9. Section 61(2) of the Borders Act 2007 sets out a list of the Acts which are to be regarded as "the Immigration Acts" which includes "this Act" and Schedule 1 to the Interpretation Act is amended accordingly (s.61(4)). While the replacement applied for is a mechanical exercise, as these claims show a decision is made whether the replacement should be made. That decision, which is challenged, is made under the Regulations which are an instrument having effect under the Borders Act 2007 which is an Immigration Act. Accordingly, the UT(IAC) not only has jurisdiction but, since all three conditions referred to in s.31A are met, transfer to the UT(IAC) must take place.

10. Those relevant statutory provisions were not drawn to the attention of Judge Jordan or me. Judge Jordan considered that the decision under attack, which was an administrative decision, arose from the repercussions from the applicant's original assertion of his date of birth, which did not accord with that in his passport, but any issues relating to his leave to enter or remain in the UK were no longer material. Assuming that the decision is not one made as I have stated in paragraph 9 above, that in my view is too narrow an approach. It is clear that the transfer of an NTL has and indeed is clearly intended to have immigration consequences and will affect the right to enter the UK. If the ILR does not appear to have been granted to the same person who seeks to enter, he will be liable to have his entry refused. Equally questions may arise about whether he is the person who has leave to remain if in any circumstances his identity has to be checked. Thus the decision does relate to leave to enter or remain.

11. It follows that in my view the UT(IAC) had jurisdiction and that a mandatory transfer would be appropriate. I will accordingly deal with these cases sitting as a judge of the UT(IAC) since any rights of appeal are identical and to order a transfer would be an unjustifiable waste of time and money. I would only add that I was told a number of identical applications have been dealt with and refused by the UT(IAC). If Judge Jordan was correct all would arguably be nullities and fresh consideration would have to be given by the Administrative Court. No doubt, consideration could be given to an ex post facto direction by the Administrative Court that transfer to the UT(IAC) should be made since it would be just and convenient to do so. But for reasons which will become apparent I doubt that any further applications of this nature will be needed.

12. The material background to each claim can be dealt with shortly.

(1) Huang.

The applicant entered the country clandestinely in 2000 and claimed asylum on 8 May 2000. He gave his name as Mei Lin Huang and his date of birth as 7 April

1983. He says that he gave those false details on the advice of the criminal gang whom he had paid to facilitate his illegal entry. His true identity is, he now says, Meilin Huang born on 2 October 1978. His claim was refused and his appeals dismissed, but he remained here and on 4 January 2011 he was granted ILR using the same false details. His application for the NTL stamp disclosed the falsity of his identity since his Chinese passport issued to him in 2009 contained what he now says are his correct name and date of birth. His application for the NTL was refused on 10 June 2011. Fresh consideration has been given and the refusal has been maintained in a letter of 5 October 2015.

(2) Zhou.

The applicant entered the county illegally and claimed asylum on 15 November 2006 giving her name as Shu Mei Zhou and her date of birth to be 15 March 1976. Following refusal of her asylum claim, she remained here and on 22 March 2011 was granted ILR under the same identity. On 30 October 2013 she applied for an NTL using the name Shumei Zhou with a date of birth of 18 March 1976. She now says that she had always believed her date of birth to have been 15 March 1976 and had celebrated her birthday on that day and so she was surprised to discover that, as her passport showed, her true date of birth was 18 March 1976. Her application was refused on 1 May 2014. The refusal was upheld in a letter of 5 October 2015.

(3) Pan.

The applicant applied for asylum following his unlawful entry in 1998 on 28 November 2001 giving his name as Xian Fa Pang born on 3 September 1972. His application was refused on 3 April 2003. There was much correspondence between representatives of the applicant and the Home Office, but in all the false identity was maintained. Eventually on 17 August 2010 ILR was granted. On 12 November 2010 he applied for a NTL giving his name as Xian Fa Pan born on 3 September 1970, which agreed with his passport save that his name was given as Xianfa Pan. That application was withdrawn and a fresh one made giving the same details on 25 June 2012. This was refused on 27 September 2012. Following a judicial review claim the respondent agreed to reconsider the case but refused again on 15 August 2014. The refusal was maintained by letter of 7 October 2015. His excuse for giving the false date of birth was that his peers had advised him that it was common practice and safer for him to provide such false details.

(4) Yu.

The applicant entered the country and claimed asylum on 23 June 2001. She produced a landing card giving her name as Iu Mai Ing with a date of birth 26 April 1978. She says that she was advised by her peers to give a false date of birth because she was frightened of being returned to China. Her asylum claim was refused on 29 June 2001 by which time her name was recorded as Mei Ying Yu with the false date of birth. She did not leave the UK and on 10 September 2009 was granted ILR under the so-called legacy arrangements having given the same false date of birth. On 13 October 2010 she submitted a NTL application in which

her correct details were said to be Meiying Yu born on 26 April 1974. This was refused on 6 June 2011. The refusal was maintained by letter of 6 October 2015.

(5) Lin.

The applicant applied for asylum on entry to the UK on 14 December 2001. He called himself Jian Lin Zheng. On 11 June 2003 his asylum claim was refused and his appeal was dismissed on 15 December 2003. On 24 September 2010 he was granted ILR under the legacy arrangements. His name was given then as Jian Len Zheng (aka) Jian Lin Zheng. On 24 April 2011 he made his NTL application in the name of Aiqing Lin. He produced a deed which showed change of name on 15 March 2011, but his passport issued on 31 January 2011 showed the name Aiqing Lin. His application was refused and the refusal was maintained by letter of 25 September 2015.

13. There is no doubt that each applicant provided false details and it is clear that in all save perhaps Zhou there was deliberate deception. The purpose of the false details was to avoid return to China if asylum was refused (as in most cases was probable) since the Chinese authorities would not accept the return of someone whose details provided by the UK authorities did not match their records.

14. I have been concerned to see that a number of applicants have said that they informed their representatives of their true identities when giving instructions for their applications for ILR. They say they were told that that was not material and need not be put to the respondent. It may be that these allegations should be followed up, but I recognise that any investigations would be unlikely to get very far since I do not doubt that the representatives would simply deny that they had been given the information.

15. The initial refusals in each case simply stated that the respondent was not satisfied that the identity in the passport was the same as the person who had been granted ILR. This approach followed from casework instructions then in force given to caseworkers. Unless the caseworker was satisfied that the change of identity was genuine and supported by appropriate documentation (for example a change of name or marriage or by deed poll), the application should be refused. The refusal should be in a standard form, namely that the respondent was not satisfied that the identity in the passport was the same as the person granted ILR.

16. That direction has since been changed and so I need not, subject to one point, go into it in any further detail. Suffice it to say it is obviously unsatisfactory when the real concern is, as in all these cases, not that the identity differs but that the false information was given when the ILR was sought. It is accepted by the respondent that there is no concern that there is a different identity but that deception was practised.

17. The respondent's detailed defence was filed well out of time. This was because it was believed that a case raising the same issues was due to be determined by the UT(IAC) and so it was decided that it would be sensible to await the outcome of that case. Unfortunately the applicant in that case decided not to pursue it. The applicants have sought to persuade me not to permit the respondent to rely on her defence and in particular on the subsequent decisions made in September and October 2015. I have no doubt that that was not a sensible course since the most that could have been

obtained had I been persuaded that the original refusals could not be upheld was an order that fresh consideration be given. Thus, since it was not suggested that the applicants were prejudiced in the sense that they could not deal with the claims on the basis of the recent decisions, I rejected that submission. Equally the applicants were entitled to amend their claims to deal with the fresh decisions.

18. The respondent has lodged a statement from Mr Mark Roberts, a policy advisor within the Home Office who has responsibility for the NTL policy. Since 29 February 2012 the application for a foreign national granted ILR would be for a NTL or Biometric Residence Permit (BRP). Prior to that, the application would be for a NTL vignette to be placed in their passport. The Home Office will not issue any official document unless satisfied of the person's true identity. Equally, it is of fundamental importance that applicants should always provide true, reliable and comprehensive information in making any application. The current guidance as updated on 1 July 2015 provides:-

> "The Home Office will not normally issue a document in a new identity where a person has either directly, or indirectly, obtained the document using a fraudulent identity: NTL applications that have been submitted under an identity which differs to that under which an applicant was granted ILR will usually be refused, unless the change is in relation to an accepted legitimate and documented change".

That is an entirely reasonable and understandable approach. Equally it is obviously important that where deception has been practised it will be clear that that will create difficulties for the applicant which may result in him losing the benefit of the status obtained following use of deception. Mr Roberts relies on this as justification for a refusal to grant an NTL application where fraud has been practised because that would, he says, effectively be to condone or reward deception.

19. Following application of this policy and the need to ensure that those who practised deception should not gain from that deception, the fresh decisions in each case stated that the applications were refused because of the false information relied on to obtain ILR. In two (Huang and Pan) it was suggested that the way ahead would be to agree that the ILR be revoked so that a fresh consideration could be given to whether ILR should be granted. It is not suggested in any of the cases that ILR would be revoked by the respondent. Accordingly, ILR would remain but the applicants would be unable to travel and might incur problems if immigration checks were made having regard to the differences between the identities set out in their ILRs and those in their passports.

20. It seemed to me that this was a wholly unsatisfactory situation. It meant accepting that the ILR which was tainted by the deception should remain in being but that the NTL or BRP which should result from ILR would not be granted. Accordingly, I suggested that the respondent should notify an applicant for an NTL where it was believed that ILR was tainted by fraud that she required the applicant to show cause why she should not revoke the ILR. This would require the applicant to put forward any excuse for having given the false information and to show why despite any deception ILR should continue. This would make it clear that such fraudulent practices would not be endorsed and even though ILR had been enjoyed for some time it might properly be revoked. This would in my view meet all Mr Robert's concerns.

21. I was, I confess, surprised to hear from Miss Anderson that consideration was being given to revocation. There is certainly nothing in the guidance or any documentation which indicated that. But both she and counsel for the applicants agreed that that approach was reasonable and could not properly be criticised.

22. In these circumstances, it is not in my view necessary for me to go into further detail of the individual circumstances of these cases. In each the respondent should notify the applicant of the need to show cause why the ILR should not be revoked and that approach should apply to all cases where NTL is applied for following incorrect information which led to leave to remain. I am aware that this issue has arisen in a significant number of cases involving Chinese nationals and in addition Albanians who asserted that they were from Kosovo. I do not doubt that there may be others.

23. I am satisfied that simply to leave the ILR in being but to refuse the NTL is not justifiable. To that extent, the decisions under attack may be considered to have been erroneous. I shall hear counsel on what orders I should make in these cases. But if, as I understand from Miss Anderson, it will be the policy in future to act as I have indicated, no further claims would be likely to be entertained. No doubt, if ILR is revoked, action may be taken. If it is not, an NTL or BRP should normally follow.