Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

JR/13180/2015
JR/3158/2016

The Queen on the applications of
(1) Mrs Li Zheng
(2) Mr Fushan He and another

Applicants

v

Secretary of State for the Home Department

Respondent

Before the Honourable Mr Justice Collins sitting as a Judge of the Upper Tribunal

Application for judicial review: substantive decision

Having considered all documents lodged and having heard Mr Khubber of Counsel, on behalf of the Applicants, instructed Descartes Solicitors and Miss Rowlands of Counsel, on behalf of the Respondent, instructed by the Government Legal Department at a hearing at Field House, London on 21st February 2017.

Decision and Order: the application for judicial review is allowed

(1) Permission is granted for judicial review in the application JR/3158/2016.

(2) Both claims are allowed and the decisions quashed.

(3) The respondent must pay the applicants' costs of both claims to be the subject of detailed assessment if not allowed.

4) Leave to appeal is refused.

Reasons

The reasons are set out in the attached judgment given in the parties' presence.

Signed: _____

The Honourable Mr Justice Collins

Dated: **25 May 2017**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

Field House,
Breams Buildings
London
EC4A 1WR

21 February 2017

THE QUEEN
(ON THE APPLICATIONS OF)
MRS LI ZHENG (FRIST APPLICANT)
MR FUSHAN HE (SECOND APPLICANT)
MASTER ZHENYU HE (THIRD APPLICANT)

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

THE HON. MR JUSTICE COLLINS

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Mr R Khubber, instructed by Descartes Solicitors appeared on behalf of the Applicants.

Miss C Rowlands, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

- -

MR JUSTICE COLLINS:

1. There are before me two distinct applications. The first is an application for judicial review of the decision of the Secretary of State which was made originally in August 2015 and the second is against the subsequent decision of the Secretary of State which was made in November of 2015. The reason why there are two applications will become apparent in due course. I should simply add that permission was granted in relation to the bringing of the first application, but there were directions that there should be a rolled-up hearing in relation to the second. There is incidentally in addition, although it is not a matter obviously before me directly, an appeal out of time to the Tribunal which relies on a human rights claim which was made additionally. The application that was originally made was based upon the first applicant's claim to remain in this country as a Tier 1 Investor Migrant. The second and third applicants are her husband and son and were joined as her dependants. The background can be summarised fairly shortly.

2. The first applicant herself is a national of China who is now nearly 62 years old. Her husband and their son are both Chinese nationals and were dependants in relation to her applications. She also has a daughter here who is a British national. The applicants entered the United Kingdom in May 2012 with an entry clearance which was valid until 18 August 2015. She made in July of 2015 the application to extend their visas here. At that stage, unfortunately, they did not

have any legal advice or assistance. I say unfortunately as things have turned out.

3. The requirement in order to qualify under the heading that they sought leave, namely a Tier 1 Investor, was that, so far as material for the purposes of this case, that she invested £750,000, that is three-quarters of the £1,000,000 that was required, in Government bonds and the balance of £250,000 was to be in assets whose value was to be identified by the necessary documentation. What in fact the first applicant wanted to know was whether the assets in question could be property, namely houses, and her daughter in 2012 enquired whether it would be possible to acquire properties in order to meet the necessary balance of £250,000. She consulted the Home Office through its guideline and she received the information as she deposes that it would indeed be appropriate. That certainly was, she says, her understanding. In her statutory declaration she says:-

> "Sometime towards the end of June or beginning of July 2012 I contacted the Home Office general enquiries line on behalf of my mother. I spoke to a man but unfortunately I didn't take his name. I asked him specifically whether we could rely on the purchase of two properties to make up the balance of funds for the purposes of meeting the conditions of leave to remain as a Tier 1 Investor Migrant. I made it clear that 75% of funds had been invested in Government bonds and that I had cash in the bank and that I was seeking to purchase two properties" (pausing there, by "I", I think she must mean her mother).
>
> "The person with whom I spoke answered without hesitation that we could rely on both properties. He informed me that the properties would be considered as assets and that we

could we definitely rely on both properties to make up for the shortfall."

4. It was back in 2012 that the first applicant had decided that she would indeed want to remain in this country, partly no doubt because her daughter was here as a British citizen, and partly it seems that her son had also wanted to make his way here. I gather he is a talented footballer and that is what he wants to go into.

5. Having received that information she bought two properties: one was a home which was bought for £170,000 in Nottingham, and subsequently that was bought in August 2012, and later in September she bought a second property in Nottingham for £90,500 and that I gather is now let out to tenants. Their values as at May of 2015 were £180,000 and £115,000 respectively, so they made up clearly, on any view, whether on the original price or now the necessary £250,000.

6. The first applicant makes clear that if she had appreciated that there was any difficulty about relying on both properties she had the money available and would have put it somewhere else, for example in a deposit account in a bank, or would have acquired some other asset which would have been a qualifying asset within the provisions relating to her application.

7. The application made was rejected by the Secretary of State and the rejection related to the decision that the second property, that is the one in which they did not live, was not a property which could qualify in terms of the relevant Rule. The decision in question was on 4 August 2015 and what was said was, and I quote:-

> "The value of your two houses makes up the shortfall of £250,000, however you can only claim points for the value of the house that you reside in"

and that was the higher value of the two.

> "As the value of your investments over the next 2 years and 9 months requires a minimum of £199,000 throughout, insufficient evidence has therefore been provided to demonstrate that you can make up this balance of funds, as specified under Appendix A of the Immigration Rules"

and therefore the necessary points claimed were not provided.

8. There was a right of administrative review, but no right of appeal. The refusal letter was somewhat ambiguous, or rather opaque, in that it said that the application had a missing specified document, full details of which appeared earlier in the letter (at a glance it did not) and it was said that effectively the new document was not one which could properly be sought by the Secretary of State in reaching the decision.

9. There was an application for administrative review and that led to confirmation of the decision, but in the course of the application this was said, and again I quote:-

> "The applicant contacted the Home Office in 2012 enquiring as to whether she could rely on the investment of two properties to make up for the balance of the funds required in a future extension application. She was advised in the affirmative. Instructing solicitors also called the Home Office on 13 August 2015 (they give a telephone number) and spoke to someone named Christine at 3 o'clock in the afternoon who confirmed that an applicant could rely on the unmortgaged portion of both properties to make up the shortfall in the balance of funds"

and so that appeared to confirm the information that had erroneously been given to the first applicant's daughter.

10. The administrative review was decided on 11 September and that information was completely ignored in reaching that decision. In fact, all that was done was to rely on the same grounds as had been relied on before, so this is not a good start to good administration on the part of the Home Office. That led to a need for judicial review and solicitors on 21 September sent a pre-action protocol letter in which they relied specifically on the false information that they said had been given and also sought to argue that the wording that it had to be an "own home" was ambiguous. What actually the Rules provide is that, so far as property is concerned, and I quote:-

> "When using property only the unmortgaged portion of the applicant's own home can be considered and the valuation must be provided on a report issued by a surveyor who is a member of the Royal Institute of Chartered Surveyors in the six months prior to the date of application".

I do not need to concern myself with that. It is the "own home" that matters and the submission made was that "own home" was unclear and could cover property owned, even though it was one not lived in.

11. There was a response to the pre-action protocol letter on 19 October 2015 that set out the history. It stated that it was considered that an applicant's "own home" must mean their primary place of residence and that therefore only one of the properties could properly be taken into account, and then there was a transfer of £30,000 to a United Kingdom bank account, but that would have been insufficient, it was said, and in any event it failed to meet the necessary three months prior to decision requirement for the provision of the necessary assets. But Section 55 in relation to the first

applicant's son was taken into account and so, it is said, it is clear that it was recognised (and properly recognised) that it was necessary to consider that, but what was said is it had been concluded that the need to maintain the integrity of the immigration laws outweighed the possible affect on the first applicant and her child that might result from having to re-establish family life outside the United Kingdom. Whether that is a proper conclusion in the light of the material provided is, to say the least, highly doubtful, however, as I say, it makes it clear that that was clearly taken into account.

12. The first applicant decided on advice that it was sensible to make a fresh application in the sense that the necessary amount of money was transferred and so would have been properly available. This led to a fresh refusal of the claim on 26 November 2015, the application having been made on 5 October 2015.

13. In this case, so far as the balance is concerned, reliance continued to be placed upon the second property, and thus it was again stated that she did not meet the necessary requirements and for some reason best known to the author of the letter, whereas she had been granted the relevant points in relation to the investment of £750,000 and that it had been made within three months of the grant, that was said not to have been met. Quite how the decision that the £750,000 had not properly been invested was decided is frankly impossible to understand. Be that as it may, it again was said that effectively nothing more was put to persuade the Secretary of State that the decision should be changed. Again, it seems that the transfer of the additional funds was entirely ignored in this fresh decision letter. Furthermore, the only reference to the alleged false information that had been given

to the first applicant's daughter and to the solicitor was in these words:-

> "We have considered discretion on this application following the factors outlined in the letter provided by your representative. That has not been applied as no evidence has been supplied that the Home Office has provided incorrect advice".

How that could conceivably be a proper statement in the light of the statutory declaration from the first applicant's daughter and that from the representative of the solicitors, together with the attendance note, is frankly beyond me. It really is extraordinary that we find that sort of decision making on behalf of the Secretary of State which is totally irrational in all the circumstances. It is difficult to see how that could conceivably be justified.

14. In any event, an administrative review of that was sought and again what was stated was again reliance on the misinformation, failure to consider private and family life in the United Kingdom and failure to take proper account of the supporting documents. The administrative review upheld the former decision, again, the misinformation relied on was totally ignored, but Article 8 was relied on and was rejected, as again was Section 55 on the same basis, and that led to the decision to issue the second judicial review proceedings, which as I say have been made the subject of the rolled-up hearing. In fact, before that there was a pre-action protocol letter, the response to which took the matter no further. It simply did not raise any further issues, hence as I say, the fresh application. I suppose it would have been possible to have sought to amend the existing provisions in order to deal with the new refusal, but the decision taken was to issue the second judicial review. One way or another, clearly the fresh

decision had to be taken into account and had to be dealt with.

15. Now, in August of last year the Secretary of State issued a fresh letter which was said to be supplemental to and ought to be read alongside the decision of 26 November 2015. It dealt with the "own home" point and then it said, and I quote:-

> "You have claimed that you have contacted the Home Office between June and early July 2012 enquiring as to whether you can rely on the investments of two properties to make up for the balance of the funds required in a future extension application. It is noted that you did not take down details of the advisor and failed to provide sufficient evidence of this advice"

It referred to the Immigration Rules and the investment policy which clearly stated, it was said, that when using property only the unmortgaged portion of the applicant's own home could be considered. It referred incidentally to the wrong policy, but I think there was no material difference. I say wrong policy because it refers to a policy valid in 2012, whereas obviously the policy valid in August 2015 and then in the autumn was the correct one, but as I say I do not think there is any difference, essentially, between the two on this point. It goes on:-

> "You further assert that your representatives contacted the Home Office on 13 August 2015 after a decision was made on your application dated 13 July 2015 and spoke to an individual named Christine who confirmed that the unmortgaged portions of both properties could be used to make up the balance of the funds. You have also mentioned this advice in your admin review application. As mentioned above our policy clarified what it is meant by 'own home' and this was further explained in our response to your pre-

action protocol letter on 19 October 2015. In any event, such advice could not give rise to a legitimate expectation at the time of application that leave to remain would be granted".

There was reference to the case of **SH (Iran) [2014] EWCA Civ 1469** where it states:-

"There is in the ordinary case no relevant legitimate expectation, other than that the case will be considered on applicable law and policy at the time the decision is made."

16. It is also worth noting that Upper Tribunal Judge Jordan at the oral permission hearing indicates that the Secretary of State is unlikely to go against policy when he states:-

"Notwithstanding the fact that the respondent's officials cannot rewrite the law, give legal advice and are likely to attempt to do so. It is asserted that the onus was on you to check the new guidance before submitting your second application"

The letter deals with Section 55 and then go on to deal with discretion and it is said that there were no reasons why the Secretary of State should have considered exercising discretion. It goes on:-

"As mentioned above the Secretary of State does not accept that you were given wrong advice. Furthermore, that cannot amount to a good reason to exercise discretion. The Secretary of State has considered the statements provided but is not satisfied that the advice alleged was given. In any event, your failure to obtain legal advice means that your circumstances do not conduce to the exercise of discretion."

17. I have seen some bad decisions in my time. There is no doubt that this was an entirely genuine application inasmuch as the first applicant has the necessary funds available and was intending to and was meaning to obtain assets in this country which met the Rules. If she had known that a second property was not such as would comply she could and would have invested the money in some other way which would have complied. So much is clear from her conduct, both before and since the refusal was made. There is no reason whatever for the Secretary of State rationally to doubt the evidence given by both her daughter and the solicitor as to the advice given. There are no details as to what was said but it might be that it was assumed that there could not be two "own homes". It is difficult to comprehend that as a reasonable possibility. The trouble is that the Rules and the requirements of these point based applications are exceedingly complex and they are varied from time to time and regrettably it is exceedingly difficult, even for professionals, let alone for those who have no professional advice, to follow precisely what is or is not required.

18. It is apparent beyond any question the contrary is, in my judgement, entirely unarguable. The advice given persuaded both the first applicant's daughter and the solicitor, who after all knew what the Rules provided, that the view taken by those giving advice on behalf of the Home Office was that the two properties would be sufficient. There have been considerable arguments as to whether that amounts to a clear and unambiguous statement that gives rise to a legitimate expectation. Obviously it cannot change the Rule as the Supreme Court has recently made entirely clear. There is no possibility of changing what the Rules require, but there is a residual discretion, and it seems to me that where there has been a clear misunderstanding based on information given by

the Secretary of State, there can be no better reason than that for exercising a favourable discretion.

19. Of course, if there were any reason to doubt the genuineness of the application and the ability to find the necessary funding, that would be a different matter, but that does not arise in the circumstances of this case. I have no doubt whatever that the decisions made by the Secretary of State were entirely unreasonable and indeed the first applicant passes the **Wednesbury** test in seeking to have them struck down because the misinformation resulted in unfairness. It is not necessary to go on to consider whether it amounted to a legitimate expectation, which itself of course is based on fairness, but it is apparent, in my judgement, and indeed I do not think there could be a clearer case than this that in the result these applicants have been dealt with in an entirely inappropriate fashion. If ever there was maladministration, this case shows it.

20. I am glad to say that, having regard to indications that I gave this morning, further instructions have been obtained from the Home Office and it is recognised that it is necessary to make a fresh decision. It is apparent from what I have said that it will, in my judgement, be entirely surprising if the decision was not one which was favourable to the applicants. Mr Khubber has made the point that they have been further disadvantaged because if the application had been allowed back in 2015 there should have been a grant of then, I think, two years' leave to remain. The result would now be that they are approaching five years and would be entitled to apply for indefinite leave to remain, but the result of the decisions and the draconian language contained is to say that they have been rendered overstayers as a result of the refusals and unfortunately, where there is no right of appeal, Section 3C cannot apply. It seems to me that the law ought to

be that where a judicial review claim is made, that provides the same protection as 3C does in relation to an appeal, but that is not the law and that is a matter for primary legislation, but I would certainly take the view that the Home Office ought seriously to consider whether Parliamentary changes are needed, since so many rights of appeal have been abolished and the only possible remedy is judicial review in a number of circumstances. The one thing though that is entirely clear to me is that it would be manifestly wrong, unfair and irrational to treat the applicants as overstayers and to use that in any way to their detriment in relation to any future claim that they make.

21. Accordingly, and for the reasons that I have given, I am satisfied that the decisions should be quashed. Since the latest decision is that which is covered by the second judicial review, it seems that the sensible course would be for me to quash that decision, which means that I grant permission, waive any further steps that need to be taken, although I have I think to get an undertaking to pay the costs of pursuing a claim for which permission has been granted. The first decision, the subject of the first application for judicial review has been overtaken by the second, but clearly the first claim would have succeeded as well.

22. So far as the appeal under human rights is concerned, that will obviously now not be needed in the light of fresh consideration being given, although it might be sensible to make clear that the human rights claim is included in the application that is now to be reconsidered. It has been, on the way it has been dealt with by the Secretary of State, but as I say, in case there is some claim hereafter by the Secretary of State that there is no right of appeal because there has not been a formal claim based on human rights, that should be put to rest for once and for all.

23. In the circumstances, as I say, I would impress upon the Secretary of State the need to act fairly. After all, the boasts when the Prime Minister was Home Secretary was that the system was supposed to be fair and this decision making is, on any view, what was in my view, manifestly unfair.

Mr Khubber: Just a couple of minor matters. In relation to the judgment I think, and you can reflect back upon it, is the applicant's daughter actually over 18. I think she was born in 1979.

Mr Justice Collins: I thought she was a minor at one stage.

Mr Khubber: It's the son who is the minor.

Mr Justice Collins: I will make that clear. I'm sorry, that's my fault.

Mr Khubber: And when you mentioned in the judgment the reference in the claim, I think it was to the son, and in terms of the best interests issue because he is the minor.

Mr Justice Collins: No, it's my fault. For some reason I had got it into my head that it was the daughter and not the son who was the minor.

Mr Khubber: My Lord, in relation to costs I would simply say in the light of the judgment, both claims were justified ultimately and we have succeeded in terms of costs following the event and I would ask –

Mr Justice Collins: Well, you would have been entitled – I mean you could either have amended or issued a fresh claim.

Mr Khubber: Yes.

Mr Justice Collins: Well, Miss Rowlands, I don't think anything of your argument that they didn't need the first one – they did, because there wasn't any right of appeal, but then they decided to make a fresh claim.

Miss Rowlands: From the moment they made a fresh application –

Mr Justice Collins: Then you say they should have abandoned the first – it didn't make any difference did it, really?

Miss Rowlands: Well, it has in previously customised information we've had to have a separate ..... in relation to permission on both of them and there was a hearing on –

Mr Justice Collins: Yes, originally permission was refused on the papers. Quite how a judge decided that I don't know, but he did.

Miss Rowlands: My Lord, I would make a submission that there be a reduction in the amount of costs payable to reflect the fact that the claim has not been conducted proportionally.

Mr Justice Collins: Well, no I don't think so. They were put in an impossible position by your thoroughly bad administration and I don't think really any significant extra costs have been occasioned.

After all, once they got permission on the first, then the second really would have followed suit, and as I say, it could have been an amendment which would have led to the same thing and the same requirement to provide the necessary material, so I think there is really nothing in the way that it was done. No, you are entitled to all your costs in my view. Have you served –

Mr Khubber: Sir, I don't think we've got a schedule of costs ready yet, no, but –

Mr Justice Collins: Well, in that case you will have to serve a schedule.

Mr Khubber: The previous order is in view of the costs –

Mr Justice Collins: Well, subject to a detailed assessment if not agreed – that's the usual.

Mr Khubber: Yes, that's the easiest way of dealing.

Mr Justice Collins: That's what I must do.

Miss Rowlands: The only issue there is that if a schedule of costs had been served we could have done assessment today in saving costs of –

Mr Justice Collins: Well, that's a matter you can raise on the assessment so that if an assessment is needed. Yes, as I say, you will have to deal with the appeal. You need obviously to tell the First-tier that you are not going to continue with it and you won't be entitled to any costs in relation to that, but they haven't incurred any.

Mr Khubber: No, exactly – I mean that is the whole point of resolving –

Mr Justice Collins: No, but what I am saying is that regrettably money – so you won't be able to recover any. Alright.

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