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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY HUAQIN HUANG FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr Tim Jebb (instructed by JMS Solicitors) for the Applicant
Mr Philip Henry (instructed by the Crown Solicitor's Office) for the Proposed Respondent

_____

COLTON J

Introduction

[1] The applicant is a Chinese national (DOB: 5/12/91) who arrived in the UK on 5 September 2009, and claimed asylum on 26 May 2016. This was done after she was detected by the authorities in this jurisdiction. Her claim was that she was at risk of political persecution if returned to China because of her association with the China Xinmin Party (China New Democratic Party). She currently resides in Belfast with her six-year-old son who was born on 12 July 2016. I have left any references to the son's name blank throughout this judgment.

[2] The proposed respondent rejected the applicant's claim for asylum on 9 November 2016 and her appeal against that decision was dismissed on 6 February 2018. She became appeal rights exhausted on 29 August 2018.

[3] A series of further submissions in respect of her claim for asylum were then lodged culminating in submissions dated 15 December 2021. These submissions were rejected by the proposed respondent on 10 November 2022. The proposed respondent also determined that the applicant did not enjoy a right of appeal to the immigration tribunal in respect of the decision. This was the original decision challenged by the applicant. However, after proceedings were lodged, the proposed respondent issued a fresh decision dated 23 February 2023. That is the decision now challenged. In general terms, the basis of the applicant's submissions of

15 December 2021 was that her son's Article 3 and 8 Convention rights would be at risk if the applicant was forced to return to China with her.

[4] The applicant contends that the subsequent decision to reject these submissions is flawed as it failed to properly consider section 55 of the Borders, Citizenship and Immigration Act 2009. As a result of this failure the applicant asserts that the proposed respondent also failed to properly apply paragraph 353 of the Immigration Rules (the basis on which the proposed respondent refused to grant the applicant's right of appeal).

The relevant law

[5] There is no dispute as to the applicable law.

[6] The applicant focuses on the provisions of section 55(1) and (3) the Borders, Citizenship and Immigration Act 2009. These provide as follows:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (c) any general customs function of the Secretary of State;
>
> (d) any customs function conferred on a designated customs official.

> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

[7] In 2009 the Secretary of State published guidance pursuant to subsection (3), namely "Every Child Matters: Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children."

[8] There is considerable jurisprudence considering the obligation under section 55.

[9] Most importantly in this jurisdiction is the decision of McCloskey J in *JG v Upper Tribunal Immigration and Asylum Chamber* [2019] NICA 27.

[10] In that case the Court of Appeal considered the jurisprudence on section 55 and concluded that there was no single, universal test to be applied by the court or tribunal where a breach of the section 55(3) duty was demonstrated. Fundamentally, the inquiry for the court or tribunal in every case would be whether the decision maker (i) has conducted an assessment of the child's best interests and next, having done so, (ii) had had regard to the need to safeguard and promote those interests.

[11] At para [24] McCloskey J says:

> "Every breach of the section 55(3) duty exposes the child concerned to the real risk that his or her best interests will simply be disregarded. Absent a conscious and conscientious assessment of the child's best interests by the decision maker, those interests are likely to be ignored in the decision making process. The scales will not have been properly prepared. The child's entitlement is to have its best interests balanced with the other facts and factors in play, in particular the public interest engaged by the immigration function being performed: most frequently the public interest in maintaining firm immigration control, stemming from the ancient right of states to control their borders, and the public interest in deporting the certain foreign offenders. Every member of this vulnerable societal cohort is exposed to the risk of being denied this entitlement where the section 55(3) duty is breached. This is not diluted by any counter-balance or remedial mechanism."

At para [30] the judgment goes on to say:

> "Any temptation to underplay the importance of the two duties enshrined in section 55 of the 2009 Act must be resisted. As the present case illustrates graphically, the decision making in cases of this kind has profound and long term consequences for the lives of children. In theory, in a given case a breach of section 55(3) might be of no material moment, for example a mere technical or inconsequential or trivial breach. However, when one examines the detailed checklist in the statutory guidance it seems likely that such cases, if they arise at all, will be rare. The necessity of making an assessment of the best interests of every potentially affected child present in the United Kingdom is a necessary pre-requisite to performing the section 55(1) duty namely to have regard to the need to safeguard and promote those interests. Section 55(3) equips the decision maker with the means with which to make the requisite assessment by stipulating the obligatory step of having regard to the statutory guidance. The latter, in turn provides a range of tools to be employed in appropriate cases.

[12] Finally, I refer to para [34]:

> "There is another consideration to be addressed in cases involving a breach of the section 55(3) duty. While judicial review proceedings differ sharply from their private law counterpart, there is nonetheless a burden of proof in play. The applicant must establish his/her case to the civil standard of the balance of probabilities: see for example *R v Inland Revenue Commissioners, ex parte Rossminster Ltd* [1980] 1 All ER 80 at 105; [1980] AC 592 at 1026H, per Lord Scarman. We draw attention to this for the purpose of making clear that in cases of this kind, the applicant must establish a breach of section 55(3) to this standard. Experience shows that in many cases a breach of section 55(3) is – very properly – conceded on behalf of SSHD."

[13] In determining the fresh submissions claim, clearly the proposed respondent was exercising a function under section 55(2) of the 2009 Act. The decision maker has to consider whether or not the submission amounts to a "fresh claim" for asylum pursuant to paragraph 353 of the Immigration Rules. This provides as follows:

> "When a human rights or asylum claim has been refused 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 contents (i) had not already been considered; and (ii) taken together with the previously considered material, create a realistic prospect of success, notwithstanding its rejection."

[14] As is the case with section 55 there is considerable jurisprudence on the topic of paragraph 353 of the Immigration Rules.

[15] The relevant legal principles were summarised by Friedman J at paras [19]-[28] of his decision in *Mahmud* [2021] NIQB 6.

[16] In brief these principles are as follows:

(i) The first task for the proposed respondent is to determine whether the fresh materials are "significantly different" to the materials submitted previously. If not, the proposed respondent need go no further. If, however, the proposed respondent accepts that the material is "significantly different", it must then determine whether the fresh material creates a realistic prospect of success in a further asylum claim. The second judgment will involve not only judging the reliability of the fresh material but judging the outcome of tribunal proceedings assessing that material.

(ii) The test that the judicial review court should apply is one of irrationality, namely that a decision will be irrational if it is not taken based on "anxious scrutiny."

(iii) The question is not whether the proposed respondent believes that the new claim is a good one, or should succeed, but rather whether there is a realistic prospect of the immigration judge finding that the appellant would be exposed to a risk of persecution in light of the materials.

(iv) The views of proposed respondent are relevant but are only a "starting point" in the consideration of this question.

(v) The judicial review court must be satisfied that the proposed respondent has satisfied the requirements of "anxious scrutiny" and if it is not so satisfied, it will grant the application for judicial review.

[17] McCloskey J distilled the following principles from the case of *WM (DRC)* [2006] EWCA Civ 1495 in his decision in *Zhang* [2017] NIQB 92, which were subsequently approved by the Court of Appeal in *Chudron* [2019] NICA 9:

"(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."

[18] Finally, as Friedman J noted the authorities state that in asylum claims a "realistic prospect of success" in this context means "no more than a fanciful prospect of success."

Has the proposed respondent failed to engage with section 55?

[19] Mr Jebb contends that there has been a failure by the proposed respondent to engage with its section 55(3) duty. By way of example, he cites the failure of the proposed respondent to consult with a child as per section 2.7 of the guidance. He submits that in light of the decision in *JG* this failure means that the immigration tribunal would be compelled to allow the applicant's appeal as this failure would amount to "an error of law."

[20] In addition to this submission, in the Order 53 Statement the applicant asserts that the applicant's son's articles 3 and 8 rights would be breached should he be returned to China.

[21] An assessment of the merits of these arguments requires careful analysis of the immigration history.

The original decision

[22] The starting point is the decision of the First Tier Tribunal (FtT) dated 6 February 2018.

[23] It is notable that the FtT records at para [12]:

> "In his written submissions and at the hearing Mr McStravick put forward the appellant's case on the basis that she is entitled to refugee status as a result of her fear of persecution based on her political opinion and involvement with the Xinmin Party which is banned in China. He contended that removal of the appellant would breach her rights under article 3 of the European Convention of Human Rights as, if returned to China, she would face forced sterilisation, heavy fines and denial of basic civil rights for her and her child. Although article 8 was pleaded in the grounds of appeal this was not addressed in the written or oral submissions."

[24] At para [22] the FtT notes:

> "Mr McStravick did not submit that the appellant had a well-founded fear of persecution on the basis of any claimed breach of the Family Planning Regulations."

[25] In its detailed decision the tribunal rejected the claim in respect of the appellant's fear of persecution by reason of her connection with the political party which was banned in China. However, importantly notwithstanding the submissions made on the applicant's behalf the Tribunal expressly considered the potential fear of persecution based on any claimed breach of the Family Planning Regulations.

[26] Para [22] continues:

> "However, I have considered whether the appellant has such a well-founded fear. She claims to have a first child who has returned to China and who has been unable to obtain a Hukou. However, she has provided no evidence to corroborate her claim that she has had a child in December 2010 as claimed or that the child has returned to China or, indeed, that the child has been denied a Hukou or education. In any event, the appellant would be returning to China with one child born out of wedlock in the UK. It is not clear whether the other child, if such a child exists, will be living with her or will continue to live with his paternal relatives."

[27] The tribunal goes on to consider the relevant Country Guidance cases of "*AX (Family Planning Scheme) China CG* [2012] UKUT 00097 (IAC) and *HC & RC (Trafficked Women) China CG* [2009] UKAIT 00027.

[28] Having considered the case of *AX* in particular, the Tribunal concluded at para [26] as follows:

> "26. It is clear from this guidance that the appellant may face a fine in relation to one or both children. Any such fine is likely to be an amount within her means. The guidance in *AX* indicates that the breach of the Family Planning policy is a civil, rather than a criminal matter. The appellant may have to pay a fine before her children are issued with a Hukou.
>
> 27. The appellant said in her asylum interview that her parents are quite poor (Q100), however, she has failed to satisfactorily explain how they raised the money to provide evidence in connection with her student fees application. It is therefore unclear what financial assistance would be available to the appellant on return to China.
>
> 28. In any event the evidence accepted by the Tribunal in *AX* is that there is legislation to prevent against destitution and the appellant will have support from the State if she needs it."

[29] The Tribunal went on to consider the issue of forceable sterilisation or abortion in China. Again, relying on *AX* the Tribunal said:

> "30. There is no evidence of a crackdown in the appellant's home area. There is no evidence of an individual risk or of credible evidence that she, or members of her family in China, have been threatened with, or have suffered, serious adverse ill-treatment by reason of her breach of the Family Planning Scheme. Even if there is any risk in her home area, I am satisfied that she could internally relocate within China. She previously relocated to the UK. She is young, fit and healthy and could work in China. She can support herself and her child elsewhere in China and there is no evidence that it would be unduly harsh for her to relocate within China if necessary. Her former partner, the father of both children, has recently been arrested and he too may well

> be returned to China if he cannot establish a right to stay in the UK. He too could support his family there.
>
> 31. The appellant has not shown that there is a real risk that she will be persecuted in China as a result of having had children in contravention of the Chinese family planning laws or that she or her children are at risk in China as a result of not having a Hukou."

[30] The Tribunal notes that no written or oral submissions were made in relation to article 8. Nonetheless, the Tribunal considered this. It concluded that the appellant had not shown that she can meet the requirements of the immigration rules in relation to article 8.

[31] The Tribunal went on to consider "article 8 outside the immigration rules" and went on to conclude:

> "44. I firstly consider the best interests of the appellant's child. The child is now aged 1½. There is no evidence that the child has any private or family life outside of that with the appellant. There is no evidence of any relationship with the child's father. In any event, he is in immigration detention and may well be returned to China. On the basis of the evidence before me I find that it is in the best interests of the child to be with his mother, the appellant.
>
> 45. In considering the steps in *R v SSHD ex parte Razgar* [2004] UKHL 27, I find that the appellant has a family life in the UK with her child. However, as they would be returned to China together there would be no interference with their family life. There is no evidence as to the nature and extent of any private life established by the appellant in the UK. However, there may be an interference with any private life she has developed or the duration of her stay here. As the appellant cannot meet the requirements of the immigration rules removal will be in accordance with the law.
>
> 46. I go on to consider whether the decision is proportionate with the respondent's legitimate aim of the enforcement of immigration control. In considering proportionality I take account of the fact that the appellant has been in the UK since September 2009. I take account of the length of residence as a factor in her

> favour. There is, however, no evidence as to the nature and extent of any private life she has developed.
>
> 47. On the other hand, the appellant's parents are in China and would, on my findings, be able to support the appellant and her child on their return there. Although she provided no evidence to support her claim, she claims that her elder child is also in China."

[32] The applicant was refused permission to appeal by the upper tribunal on 21 June 2018. The upper tribunal Judge concluded that:

> "Not only has the Judge considered the evidence with a required degree of extra scrutiny she has also given adequate reasons for the findings made. The weight to be given to the evidence was therefore a matter for the Judge. It has not been made out the findings made are not within the range of findings reasonably open to the Judge on the evidence and no arguable irrationality or perversity is established. Disagreeing with the findings made or desire for more favourable findings does not establish arguable legal error, per se. Permission refused."

The further submission

[33] The relevant sections of the further submissions which were considered by the proposed respondent are as follows. Under the heading "Briefly tell us what your further submissions are about" the applicant states:

> "My son was born in the UK, and he is now in primary school. He is due to start primary 2 in September 2022. He has lived all his life in the UK for approximately five years and six months.
>
> My family and I continue to have ECHR article 8 rights here in the UK and considering the length of time we have lived in the UK, particularly the length of time my son ___ has lived in the UK.
>
> He has been educated and taught in English and English continues to be his first language. However, in China, children are taught in Mandarin which is the first and main language and also consists of a whole new system of writing that my son is not used to or has never been

> introduced to as he has been taught to read, write and study in English in the UK.
>
> This demonstrates that my son's education will suffer as he will have no ability to understand what will be taught in the classroom in China and removing them to China would be disruptive to their cognitive ability and structured learning process that they are used to and are living in.
>
> They believe the decision maker must take into account section 55 of the 2009 Act."

[34] Under the heading "Why does this mean you should remain in the UK?" the applicant has written:

> "My family and I have built a life here in the UK and we have integrated into the society here in the UK and my son has never lived anywhere else other than the UK.
>
> Again, my son was born out of wedlock. Hence, he will be denied rights of social welfare which includes adequate medical care and free and adequate education. However, in relation to education in China, children are taught to read, write and learn in Mandarin which is the main language of China. We believe that my son's cognitive ability will be adversely affected as his first language is English and he has been taught in the English language.
>
> I believe removing my family and I to China would engage ECHR articles 3, 8 rights and s55 of the Borders, Citizenship and Immigration Act 2009."

[35] Attached is a statement from the applicant which contains the following paragraph:

> "In relation to accessing adequate medical care and free education in China, my son will be denied those social benefits which are based on having a "Hukou" as those who are unregistered and lack a Hukou 'are made to live with no access to any social welfare or legal identity.' Children born outside of policy, like my children, are not eligible for Hukou and the health and education service that registration provides. My son will not be registered

> for Hukou, hence he will be denied rights to these social welfare."

[36] Also attached to the application was the country policy and information note on China issued by the Home Office Version 3, November 2018 which dealt with contravention of National Population and Family Planning Laws.

[37] There was a letter from the applicant's son's primary school dated 7 September 2021 in the following terms:

> "To whom it may concern
>
> I confirm that ___, DOB: __ of ___, is registered in _____ Primary School and is due to start year 1 on 16 September 2021.
>
> Yours faithfully"

[38] There was also a note from the applicant's son's GP dated 7 September 2021 which said:

> "This is to confirm that the above-named has been registered at this surgery."

[39] There was also a letter from the applicant's son's nursery school dated September 2021 which states:

> "This letter is to certify that ___ was a pupil at our nursery school, ____, during the academic year September 2020 to June 2021.
>
> The attendance of ___ was excellent and the commitment and dedication of the parents to ___ and the nursery school was exemplary. The family integrated extremely well into the community and always strove to encourage ___ to take part in all community and social activities."

[40] There were various photographs attached showing the applicant's son participating in school activities with other children and some family photographs.

[41] The further submissions were rejected by the proposed respondent, initially on 10 November 2022. The reasons for the decision are detailed and bear reading in full.

The decision under challenge

[42] I refer to the structure of the written decision and highlight some of its contents.

[43] The decision commences by setting out a summary of the further submissions. Of importance the first bullet point in the summary is as follows:

> "You claim that if returned to China your son ___ would be denied free education and medical care within and would not have the same access to social benefits as other Chinese citizens upon return. Thus, your claim is due to him not being able to obtain a Hukou as he would be unregistered in China, having been born in the UK."

[44] The decision goes on to accurately summarise the further submissions.

[45] The decision then sets out all the evidence considered in making the decision.

[46] Importantly, this included the Home Office policy document on China contravention of National Population dated November 2018 and the "Every Child Matters" document for UK Border Agencies dated November 2009.

[47] In making the decision, the decision maker clearly had available all the relevant evidence.

[48] The decision notes that the decision maker had made a request for further evidence in relation to details of the applicant's partner, but none had been provided.

[49] The decision then sets out the submissions that had previously been considered. These are accurate and comprehensive.

[50] Importantly, they included the following:

> - "You claim to have a well-founded fear of persecution for breaching family planning laws within China.
>
> - You also claimed to be in need of subsidiary protection under humanitarian protection grounds again due to your claim that upon return to China you had faced difficult living conditions due to the implementation with the family planning laws within China."

[51] The decision then summarises the decision of the First Tier Tribunal and the subsequent decision by the Upper Tier Tribunal to dismiss the appeal. The decision then sets out in detail the reasoned decision of the FtT.

[52] Included in that is the following paragraph:

> "It is clear from this guidance that the appellant may face a fine in relation to one or both children. Any such fine is likely to be an amount within her means. The guidance indicates that the breach of the family planning policy is a civil rather than a criminal matter as that the appellant may have to pay a fine before her children are issued with a Hukou."

[53] The summary of the decision is accurate and covers all relevant detail.

[54] In relation to submissions that have not previously been considered but which do not create a realistic prospect of success the decision maker identified the following:

> "Below is a consideration of the protection-based submissions that have not previously been considered, but that taken together with the previously considered material, do not create a realistic prospect of success before an immigration judge.
>
> You claim that upon return to China your son ___ will not have access to adequate medical care and education in China, and that he will be denied the social benefits because he is unregistered, does not or will not be able to obtain a Hukou, or made to live with no access to any social welfare or legal identity.
>
> You claim that children born outside of policy like ___ are not eligible for the Hukou and the health and education services that registration provides.
>
> You claim that your son will not be registered for Hukou, hence, he will be denied rights to these social welfare.
>
> You therefore claim that upon return to China without the ability to secure a Hukou for ___ he will face treatment and/or harm that would breach his human rights under article 3 of the ECHR."

[55] The decision maker then goes on to refer to the current Country Guidance and information in relation to contravention of the population of family planning law in China. Importantly, the relevant version is not that which had been referred to by the applicant but rather version 4 dated May 2022.

[56] This is important because the current guidance indicates a significant decrease in any concern about Chinese family planning policy.

[57] The updated document notes that

> "2.4.5 There have been several changes to the Population and Family Planning law since the promulgation of *AX*. Childbirth is still expected to occur within marriage, however, the birth registration system was relaxed in January 2016 to allow couples to have two children and the requirement for couples to go though an approval process for their first two children was removed. The policy was relaxed further still, and the law amended in August 2021 to allow married couples to have three children …"

[58] The new guidance points out with the introduction of the three-child policy in August 2021, Articles 41 or 42 of the Population Family Planning law were removed. These related to enforced penalties for those who violated birth restrictions. This includes the abolition of social maintenance fees (or social upbringing charge) which couples were charged for having in excess of the policy limits. It also includes the removal of penalties which employees were subject to at work (which is loss of employment) for having children in excess of the policy.

[59] 2.4.8 of the updated document states:

> "2.4.8 China is facing a shrinking labour pool and a rapidly ageing population. Enforcing child limits is now a low priority for the government and there is no longer encouragement for "late" marriage and "late" births. Several initiatives have also been announced and are in the process of implementation, aimed at boosting the birth rate and "reducing the burden" of raising a child. These include encouraging local governments to offer subsidies and extended parental leave, increasing women's employment rights and improving childcare infrastructure …
>
> 2.4.10 Financial and administrative penalties for births that exceed birth limits have been abolished

following the introduction of the three-child policy. Even if a person were to still face administrative penalties in general, this will not be sufficiently serious by its nature and/or repetition or by an accumulation of various measures to reach the threshold of persecution or serious harm. Each case must be considered on its facts with the onus on the person to demonstrate that they would be at risk.

…

2.4.15 Single (ie unmarried) mothers are not mentioned in the National Family Planning law and as such, any children born to a single mother (who does not marry within 60 days of the child's birth) are considered outside the policy. Single mothers may be required to pay a social compensation fee although it is unclear whether this will still be enforced now the social compensation fees have been abolished in line with the updated three-child policy.

2.4 16 Many local governments require a marriage permit in order for an expectant mother to be able to access maternity benefits. Guangdong Province and Shanghai have removed this requirement resulting in a single mother being able to access these benefits.

2.4.17 In the past many children born to single/unmarried parents were denied a household registration document (Hukou) preventing them from accessing public services, medical treatment and education. In December 2015 President Xi Jinping announced that China would be providing registration for the nearly 13 million unregistered children in China. He also announced that registration for a Hukou should take place irrespective of family planning and birth limits. However, there was limited information to show that the 13 million unregistered did actually gain documentation and some sources suggest that unregistered children still had difficulties accessing public services.

> 2.4.18 As they are outside the Family Planning Policy, *AX* is of less value in cases of single unmarried mothers. The onus will be on a mother with an illegitimate child to show that, if returned, she does not have sufficient family support or income, such that any enforcement with a social compensation fee along with a denial of service, education and healthcare to the child would reach the threshold of treatment in breach of article 3 ECHR."

[60] I pause at this stage to note that Mr Jebb points out that the decision maker did not refer to 2.4.17 and 2.4.18 in the course of the written decision.

[61] Having set out the extracts of the up-to-date guidance the decision maker considers the new evidence under consideration and concluded that the applicant did not have a well-founded fear of persecution for a Convention reason.

[62] The decision maker then went on to consider the issue of humanitarian protection.

[63] She considered the article 8 rights based on family and private life. She looked firstly at the "partner route" and understandably came to the conclusion that the applicant did not meet the test under R-LTRP.1.1(a), (b) and (d) of Appendix FM (family member section of the Immigration Rules).

[64] In relation to the applicant's son the decision maker says as follows:

> "You have told us you have a parental relationship with ___ in the UK. However, paragraph EX.1(a) of Appendix FM does not apply in your case because ___ is not a British citizen or has not lived continuously in the UK for at least seven years.
>
> On my assessment it is reasonable to expect ___ to leave the UK along with yourself and Mr ___ as it would be in the best interests of the child to remain as part of the family unit. You and Mr ___ have spent the majority of your lives in China and would easily be able to reintegrate back into Chinese society and would not fall foul of the Chinese Family Planning laws as you have claimed, in light of the latest guidance. Therefore, you would be able to secure education and any healthcare ___ may require, contrary to your claims. You claim that your son does not speak Mandarin and would therefore struggle with continuing his education in China.

> However, you speak Mandarin and given ___'s young age it is considered not to be unreasonable for you could teach (sic) and assist his integration with the Chinese education system and with learning Mandarin. It is documented that Mr ___ also speaks Mandarin and it would be deemed unlikely that Mandarin would not be spoken around the home naturally and this could continue upon return to China.
>
> You claim that ___ has a right to an education and private life under article 8 of the ECHR, however, the provisions under this article does not necessarily fail to be provided by the UK especially given the Country Guidance in China and that ___ would have access to education.
>
> Your evidence fails to demonstrate that you would not be able to continue your family life in China as you have done previously, and it would be in the best interests of ___ to remain with the family unit, even if that family unit were to relocate outside of the UK."

[65] I pause here to note that Mr Jebb is critical of the failure of the decision maker to expressly refer to section 55 of the 2009 Act and the relevant guidance in the November 2021 decision. However, it is clear that the decision maker is addressing "the best interests of the child." In that regard it could not be considered that he did not have regard to section 55.

[66] In any event the revised decision of 23 February 2023, which is the one under challenge adds the following to the paragraph I have just quoted, namely:

> "Your evidence fails to demonstrate that you could not be able to continue your family life in China as you have done previously, and it would not be in the best interests for ___ to remain within the family unit, even if that family unit were to relocate outside the UK and ___'s best interests have been considered in accordance with the statutory duty on the Home Office under section 55 of the Borders, Citizenship and Immigration Act 2009 as above."

[67] The decision maker then goes on to consider aspects of the claim in relation to the applicant's private life and concludes that there are no significant obstacles to integration into China to which she would have to go if required to leave the UK. This is fully analysed in the decision. The decision maker then considers exceptional circumstances, the question of discretionary leave and compassionate factors. Having analysed all of these considerations it was concluded that:

> "I have concluded that your submissions do not meet the requirements of paragraph 353 of the Immigration Rules and do not amount to a fresh claim. The new submissions taken together with the previously considered material do not create a realistic prospect of success. This means that it does not accept that should this material be considered by an immigration judge that this could result in a decision to grant you asylum."

Consideration of the applicant's case

[68] Returning to Mr Jebb's submissions when asked to point to the basis on which it is asserted the proposed respondent did not have regard to section 55 and the Home Office policy, he relies on the "failure" of the proposed respondent to consult with the applicant's son in accordance with section 2.7 of the guidance. Section 2.7 of the guidance provides as follows:

> "2.7 The UK Border Agency must also act according to the following principles:
>
> - Every child matters even if they are someone subject to immigration control.
>
> - In accordance with the UN Convention on the Rights of the Child, the best interests of the child will be the primary consideration (although not necessarily the only consideration) when making decisions affecting children.
>
> - Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.
>
> - Children should be consulted, and the wishes and feelings of children taken into account wherever practicable when decisions affecting are made even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present, they will have primary responsibility for the children's concerns.
>
> - Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience."

[69] In the court's view this guidance does not impose a mandatory obligation on the agency to consult directly with a child when considering his or her best interests. It is obliged to consult "wherever practicable." Is it seriously being suggested that someone from the Home Office should arrange to speak to the applicant's child, aged six years, to understand his wishes and feelings? As the guidance notes in instances where parents and carers are present, they will have primary responsibility for the children's concerns.

[70] In this regard the applicant has fully articulated what she considers to be in the best interests of the child. However, I do not consider that it could be said that the failure to consult with the child by the proposed respondent means that the decision maker has not complied with its obligations under section 55 and the relevant guidance.

[71] On any showing it is clear that both at first instance and, more importantly, in the decision under challenge the decision maker has looked at the best interests of the child and has come to a conclusion which is rational and could not be considered *Wednesbury* unreasonable.

[72] In relation to the arguments based on the Chinese Family Planning policy it is clear that, in fact, the applicant is now in a weaker position than she was when the matter was first considered.

[73] Under the previous guidance based on the decision in *AX* the applicant would be unlikely to establish a potential breach of article 3. The significant developments and changes in the current guidance indicate that this is a significantly reduced risk.

[74] Turning then to the appropriate test under paragraph 353 the proposed respondent did consider that the fresh materials were "significantly different" to the material submitted previously. I personally entertain some doubts about this. It seems to the court that the issues raised were considered previously. It might be said that the fact that the applicant's child was now five years older and attending primary school would be sufficient to constitute fresh material. However, for the purposes of this leave hearing I am prepared to accept that the applicant does meet the first hurdle in terms of establishing that the fresh material was "significantly different."

[75] More importantly, the issue is whether the fresh material "creates a realistic prospect of success in a further asylum claim." For the reasons set out above the proposed respondent has come to the decision that it does not.

[76] It seems to the court that in reaching that decision applying the test of anxious scrutiny it could not be said that the impugned decision was irrational.

[77] It seems to the court that having considered the decision under challenge there has been a conscious and conscientious assessment of the child's interests by the decision maker.

[78] Applying the test of anxious scrutiny it could not be argued that the conclusion in relation to the realistic prospect of success was irrational.

Seven-year threshold

[79] As indicated above a potential significant difference between the initial decision and the subsequent fresh submission is the age of the applicant's son.

[80] The court notes that the applicant's son will be seven years of age on 12 July 2023.

[81] This represents a significant threshold in the context of how the authorities approach family members.

[82] Under the "Family Member" (FM) section of the immigration rules if:

> "1.(a) The applicant has a genuine subsisting parental relationship with a child who:
>
> (aa) Was under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis this paragraph applied;
>
> (bb) Is in the UK;
>
> (cc) As a British citizen or has lived in the UK continuously for at least seven years immediately preceding the date of the application; and
>
> (ii) Taking into account their best interests is a primary consideration it would not be reasonable to expect a child to leave the UK; or
>
> …"

[83] Irrespective, therefore, of this court's decision it seems inevitable that the applicant will lodge a further submission seeking reconsideration of her case on the basis that the seven-year-old threshold in respect of her son has passed. To a large extent this renders these proceedings futile.

[84] Mr Henry suggests that much of the delay in this case by the lodging of fresh submissions has been strategic.

[85] Understandably, this is contested by the applicant. As a comment, recognising the pressures under which the proposed respondent acts, much of the issues concerning delay could be avoided if decisions were made promptly as is anticipated in the Immigration Rules and in Home Office guidance.

[86] In any event it seems to the court that the refusal of leave in this case will be academic, given the inevitability of a fresh application.

[87] However, for the reasons set out above the court concludes that the threshold for leave set out in the case of *Ni Chuinneagain* [2022] NICA 56 of an arguable case having a real prospect of success has not been met.

[88] Therefore, leave for judicial review is refused.