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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Wu's (Jun) Application (Judicial Review) [2016] NIQB 34

IN THE MATTER OF AN APPLICATION BY JUN WU FOR JUDICIAL REVIEW

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MAGUIRE J

Introduction

[1] The applicant in this case is Jun Wu. He is a Chinese national. He was born on 21 September 1965. He is therefore now aged 50. It appears that he came to the United Kingdom on 23 October 2003. When he arrived he did not make an asylum claim. However, he did so quite some time later on 26 July 2007. This was on the basis that he feared persecution in China as a result of an alleged conflict he said he had been in with the Chinese local government officials in Quin Tiain in Zhe Jaing Province. The applicant's version is that he was a teacher living in Quin Tiain. At this time, which was *circa* 2003, he was living with his wife and two young children. The local government authorities decided to build a hydro-electric dam. The proposal involved the demolition of his village – some 700 houses. The applicant was opposed to this plan and attended protest meetings against the proposed project. It was this which led him into conflict with the municipal officials in the area. In the course of this conflict he claimed to have been arrested and abused during a period of custody. Believing himself to be at further risk of abuse, he left in July 2003 and made his way to the United Kingdom.

[2] The applicant's asylum claim (together with related claims for humanitarian protection and breach of human rights) was refused by the Home Office on 3 December 2007. His account, it appears, simply was not believed. He then appealed to the Asylum and Immigration Tribunal. His case was heard by Judge

Gillespie who, on 13 March 2008, rejected his appeal. Judge Gillespie produced a substantial decision in which he fully rehearsed the factual background. He heard evidence from the applicant. But it is clear that he did not accept the applicant's account. In the course of his decision Judge Gillespie was able to point to numerous inconsistencies in the various accounts which the applicant had over time provided. It is unnecessary to set these out here. The judge also found the applicant's account of events to be untruthful. His account for not applying for asylum for a lengthy period *viz* that he was afraid to do so, was not credible, in the judge's view. Overall the judge upheld the decision of the Home Office having found that if the applicant was returned to China this would not create a risk of persecution; would not put his life in danger; and would not bring about any breach of his human rights under Articles 2, 3 and 8 of the European Convention on Human Rights.

[3] What happened in the immediate aftermath of Judge Gillespie's decision is not clear from the papers, save that it may be inferred that the applicant remained in the United Kingdom.

[4] The next event of note appears to have been in January 2011 when the applicant made a further asylum application. This application was, however, quite unlike the previous application and sought to make a case quite different from that originally put forward. That case was that the applicant could not be returned to China because he would, if returned, be persecuted on ground of his Christian faith. The actual basis for the claim was that since arriving in the United Kingdom the applicant had become an adherent to a Christian church (several different dates were given as to when this occurred). He attended a church in Belfast every Sunday and on Mondays for bible study. He had become involved in church activities and distributed leaflets inviting other Chinese people to attend the church. The applicant said that his grandfather in China had been a Christian minister and had been ill-treated by reason of this.

[5] The Home Office considered the applicant's asylum application together with some aspects of it which are not referred to above. In particular, the applicant maintained that he was suffering from depression and would be at risk because of this if he was returned to China. By a decision dated 28 February 2014, the applicant's application was refused by the Home Office. The Home Office accepted that the applicant was a practising Christian in the United Kingdom but did not accept that this would create a difficulty or a problem in terms of persecution, humanitarian protection or human rights if he was to be returned to China. Indeed, it was the Home Office's view that he would be able to practise his Christian religion in China without impediment. The Home Office noted that in respect of the aspect of his claim that he suffered from depression he had submitted no medical evidence to support it. In any event, the Home Office indicated that treatment would be available for depression in China.

[6] The applicant appealed the Home Office's decision to the first tier tribunal where following a hearing at which the applicant gave evidence and was

represented by counsel. Judge Fox, in a reserved decision, rejected his appeal. This decision was provided on 23 April 2014. Judge Fox, in a detailed decision, rejected all grounds of appeal. He placed weight upon the fact that the applicant had "never once" raised the issue of persecution on grounds of religion before notwithstanding that, on the applicant's account, he had been practising as a Christian in the UK from well before the previous asylum claim. Nor had he raised before the issue of his grandfather's alleged persecution during the earlier proceedings. In the judge's assessment the applicant's story was not credible and had been rightly rejected by the earlier tribunal. He noted that the applicant had not been baptised until 29 October 2012 and that his interview had suggested that his depth of understanding of Christianity was poor. In respect of the applicant's Christian activities, while the judge noted that he distributed leaflets, he also noted that the applicant made no attempt at conversions or anything approaching that. Judge Fox was off the firm view that the applicant, if returned to China, would not be at risk because of his practice of religion. He stated that the core of the applicant's account of persecution lacked credibility and was a fabrication designed to gain access to the United Kingdom. The applicant, in his view, was an economic migrant.

[7] Judge Fox also dismissed the various other issues raised by the applicant, for example, as regards his depression; the allegation of breach of human rights; and in respect of humanitarian protection; and so on.

[8] In particular the judge held that the needs of immigration control predominated over any right to a private life in the United Kingdom which the applicant had. Moreover, he considered it unlikely that the applicant would face any difficulty in re-establishing himself in China, if returned, even without a *hukou*.

[9] Following Judge Fox's decision the applicant sought leave to appeal to the Upper Tier Tribunal from the First Tier Tribunal. This was refused on 21 May 2014 by Judge Omotosho. He then sought leave from the Upper Tier Tribunal itself. This was refused on 8 July 2014 by Judge Chalkey.

[10] Removal directions were made by the Home Office on 19 August 2014 with an intended date of removal to China set for 24 August 2014.

[11] These judicial review proceedings commenced on 22 August 2014 and led to the Home Office agreeing not to remove the applicant pending their outcome.

[12] Initially, the applicant did not himself file an affidavit in support of these proceedings. But this was rectified by an affidavit filed by him on 2 September 2014. In this he argues that he should not be made subject to return. Any return would bring him to the attention of the authorities. In particular, he would have to obtain a *hukou*. This would, he said, bring him into contact with hostile government officials.

[13] Since the initiation of these proceedings the applicant has placed before the court materials which had not been placed before the decision maker and which are

new to the case, notwithstanding the length of the process of decision making the court has described. These included two medical reports and a report from Ms Gordon.

The Challenge

[14] This is a challenge by way of judicial review. It is not an appeal. The issue for the court is the legality of the decisions impugned. In this case it appears clear that the underlying decision impugned is that of Judge Fox. It is alleged that he erred in failing to uphold the applicant's claim for asylum (and related matters). The decisions concerning leave to appeal made respectively by the First Tier Tribunal and the Upper Tribunal were unlawful, it is said, because they failed to grant him leave to appeal and thereby failed to detect the errors of law relating to Judge Fox's decision. As the removal directions were consequential to the end of the legal road being reached, ultimately due to the decision of Judge Chalkey to refuse leave to appeal to the Upper Tribunal, the directions must fall also. The court accepts that the correct target in respect of this judicial review is the decision of Judge Chalkey, which is the operative decision denying the applicant the leave to appeal against Judge Fox's decision, which he seeks.

Country Guidance

[15] The issue of the risk to Christianity in China has been the subject of a recent decision of the Upper Tribunal dated 14 March 2014 QH (Christians – Risk) ([2014] UKUT 00086 (IAC)).

[16] It is worth extracting from it the main passages of relevance to this case:

> **"Risk to Christians in China**
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> (1) In general, the risk of persecution for Christians expressing and living their faith in China is very low, indeed statistically virtually negligible. The Chinese constitution specifically protects religious freedom and the Religious Affairs Regulations 2005 (RRA) set out the conditions under which Christian churches and leaders may operate within China.
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> (2) There has been a rapid growth in numbers of Christians in China, both in the three state-registered churches and the unregistered or 'house' churches. Individuals move freely between State-registered churches and the unregistered churches, according to their preferences as to worship.

(3) Christians in State-registered churches

(i) Worship in State-registered churches is supervised by the Chinese government's State Administration for Religious Affairs (SARA) under the RRA.

(ii) The measures of control set out in the RRA, and their implementation, whether by the Chinese state or by non-state actors, are not, in general, sufficiently severe as to amount to persecution, serious harm, or ill-treatment engaging international protection.

(iii) Exceptionally, certain dissident bishops or prominent individuals who challenge, or are perceived to challenge, public order and the operation of the RRA may be at risk of persecution, serious harm, or ill-treatment engaging international protection, on a fact-specific basis.

(4) Christians in unregistered or 'house' churches

(i) In general, the evidence is that the many millions of Christians worshipping within unregistered churches are able to meet and express their faith as they wish to do.

(ii) The evidence does not support a finding that there is a consistent pattern of persecution, serious harm, or other breach of fundamental human rights for unregistered churches or their worshippers.

(iii) The evidence is that, in general, any adverse treatment of Christian communities by the Chinese authorities is confined to closing down church buildings where planning permission has not been obtained for use as a church, and/or preventing or interrupting unauthorised public worship or demonstrations.

(iv) There may be a risk of persecution, serious harm, or ill-treatment engaging international protection for certain individual Christians who choose to worship in unregistered churches and who conduct themselves in such a way as to attract the local authorities' attention to them or their political, social or cultural views.

(v) However, unless such individual is the subject of an arrest warrant, his name is on a black list, or he has a

> pending sentence, such risk will be limited to the local area in which the individual lives and has their hukou.
>
> (vi) The hukou system of individual registration in rural and city areas, historically a rigid family-based structure from which derives entitlement to most social and other benefits, has been significantly relaxed and many Chinese internal migrants live and work in cities where they do not have an urban hukou, either without registration or on a temporary residence permit (see AX (family planning scheme) China CG [2012] UKUT 00097 (IAC) and HC & RC (Trafficked women) China CG [2009] UKAIT 00027).
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> (vii) In the light of the wide variation in local officials' response to unregistered churches, individual Christians at risk in their local areas will normally be able to relocate safely elsewhere in China. Given the scale of internal migration, and the vast geographical and population size of China, the lack of an appropriate hukou alone will not render internal relocation unreasonable or unduly harsh."

The leave application

[17] In the course of the leave application it was clear that the principal grounds of challenge related to an alleged failure by Judge Fox to apply the relevant country guidance in respect of the practice of the Christian religion in China. Mr Dornan BL, on behalf of the applicant, has argued that the applicant's practice of Christianity places him in danger should he be returned to China. It has been submitted that the applicant meets the criteria of being a Christian at risk. This is said to be based on his Church being (in terms of the law and practice in China) "unregistered" and the applicant being on a "blacklist" because of his anti-government activities. Further, it is stated that because the place where the applicant had his *hukou* has been destroyed, to obtain a *hukou* will bring the applicant to the attention of authorities so exposing him to risk. While a wide range of other matters are referred to the in the Order 53 Statement they were not pursued by Mr Dornan at the leave hearing.

The Cart Criteria

[18] It is not in dispute between the parties before the court that this application for leave to apply for judicial review, if it is to proceed, must be judged to overcome what the court will describe as the Cart criteria.

[19] These criteria are now well established. They derive from the decision of the Supreme Court in the case of R (Cart) v Upper Tribunal (Secretary of State for

Justice) and other interested parties) [2011] UKSC 28. They are tailor made to meet cases such as this where there has been a decision by the decision making authority which has already been the subject of an unsuccessful appeal to the Lower Tier Tribunal and where leave to appeal to the Upper Tier Tribunal has been refused by both the Lower and Upper Tiers. In such cases, according to the decision in Cart, what are described as "the second tier appeal's criteria" apply. What this means when translated to the issue now before the court is that there cannot be a judicial review of the refusal of leave unless:

(a) the proposed judicial review raises some important point of principle or practice; or

(b) there is some other compelling reason for the court to hear the judicial review.

[20] The adoption of these criteria recognises the important of the enhanced Tribunal structure which, in the words of Lady Hale, "deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected" (see paragraph [57] of her judgment in Cart).

[21] The approach in Cart has been applied equally to this jurisdiction: see A and Others Application [2012] NIQB 86 and DJ1 and DJ2s Application [2013] NIQB 20.

Important Point of Principle or Practice

[22] These words require little expansion or elucidation. Such an important point, it was said in Uphill v BRB (Residuary) Ltd [2005] EWCA Civ 60, must be one which is "not yet established". It will, moreover, not be one confined to the individual's personal interests, facts and circumstances: see the sister decision of the Supreme Court in Eba [2011] UKSC 29 at paragraphs [46]-[49]. In Eba, Lord Hope, referring to this category of case, said that underlying it "is the idea that the issue would require to be one of general importance, not confined to the petitioner's own facts and circumstances" (Eba paragraph [48]).

Some other compelling reason

[23] Likewise, these words are self-explanatory. However, in Cart Lord Dyson observed that this category would be engaged by a case "which cries out for consideration by the court". He went on:

> "Care should be exercised in giving examples of what might be 'some other compelling reason' because it will depend on the particular circumstances of the case. But they might include:
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> (i) a case where it is strongly arguable that the individual has suffered what Laws LJ referred to

> … as 'a wholly exceptional collapse of the procedure'; or
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> (ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences." (Paragraph [131] Cart).

[24] In PR (Sri Lanka) v Secretary of State for the Home Department [2011] EWCA Civ 988 Carnwath LJ emphasised the narrowness of this category. To overcome the test, the prospect of success should normally be 'very high' and might apply where the decision was "perverse or otherwise plainly wrong" (paragraph [35]). Compelling, moreover, means legally compelling rather than compelling, perhaps from a political or emotional point of view, although such considerations may exceptionally add weight to the legal arguments: see paragraph [36]. Extreme consequences for the individual could not in themselves amount to a freestanding compelling reason: Sullivan LJ in JD Congo [2012] EWCA Civ 327 at paragraph [26].

[25] In Re A and Others Treacy J at paragraph [44] said:

> "The circumstances in which permission to appeal refusals by the Specialist Upper Tribunal could appropriately come before the judicial review court should, in the light of the guidance in Cart, be exceedingly rare."

The application of the Cart Criteria

[26] The court has explained at some length the matrix in which the present application before the court has been made. It seems to the court that the issues which potentially arise in the applicant's judicial review application are specific to the applicant's own facts and circumstances and do not raise any new issues of general importance or issues involving any important point of principle or practice. The case, therefore, in the court's opinion, does not fall within the first criterion or category.

[27] Nor, in the court's view, does it fall within the second criterion or category. There has been no wholly exceptional collapse of procedure; it is not a case, furthermore, where there is a compelling reason for the court to hear it; and the application before the court could not be viewed as one with high prospects of success or one where there appears to be perversity or plain wrongness. On the contrary, the points raised at the leave hearing, when read in the light of the country guidance provided by QH, appear to the court to be far from convincing. The case made by the applicant now that he was on a black list appears to be one based on assertion without evidence to support it. Judge Gillespie did not view the applicant's original account of his conflict with the authorities in China in 2003 to be credible. There also appears to be nothing of substance to support the contention that the

applicant is or has been a proselytiser in regard to his church involvement or that he would be someone who would attract attention to himself if he was returned to China. There is, in the court's judgment, no compelling reason which would support the grant of leave to apply for judicial review in this case.

Conclusion

[28] In the above circumstances, the court does not consider that the Cart criteria have been met. It therefore dismisses the applicant's application for judicial review.