



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Numbers: OA/03648/2014  
OA/03649/2014

**THE IMMIGRATION ACTS**

**Heard at Birmingham  
On 19 May 2015**

**Decision & Reasons Promulgated  
On 1 June 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**MISS YI CHEN (FIRST APPELLANT)  
MASTER JIE CHEN (SECOND APPELLANT)  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**ENTRY CLEARANCE OFFICER - BEIJING**

Respondent

**Representation:**

For the Appellants: Ms E Rutherford, Counsel, instructed by Lin & Co Solicitors  
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants appeal to the Upper Tribunal from the decision of the First-tier Tribunal dismissing their appeals against the decision of an Entry Clearance Officer (post reference Beijing\1503657 and 1503668) refusing to grant them entry clearance for the purposes of settlement as the children under the age of 18 of parents who are settled here. The First-tier Tribunal did not make an anonymity direction, and I do not consider that

the appellants require anonymity for these proceedings in the Upper Tribunal.

2. Both appellants are Chinese nationals. The first appellant was born on 18 December 1995, and the second appellant born on 13 May 1997. Just before the first appellant's 18<sup>th</sup> birthday, both appellants applied to join their parents in the United Kingdom. At the time of application, their father had indefinite leave to remain, having been granted ILR under the legacy programme in 2010. Their mother, Yu He, neither had settled status nor limited leave to remain in the United Kingdom.
3. Yu He was born in China on 3 January 1973. Her husband arrived in the UK in 1999 and claimed asylum. The asylum claim was refused, but he remained in the country. Yu He left the appellants in the care of their grandparents, and arrived in the United Kingdom on 29 December 2005. She also claimed asylum. Like her husband, her application for asylum was refused. Her appeal against that refusal was dismissed in a determination promulgated on 20 February 2006.
4. On 7 April 2010 the Case Resolution Directorate wrote to the appellants' father, Mr Chen, to say that his case was in a backlog of older asylum applications that the UK Border Agency was in the process of concluding. The aim of the Case Resolution Team was to resolve cases such as his by either removing individuals from the United Kingdom or granting them leave to remain in accordance with existing law and policy. It was important that they held the most recent information about his case, and he was asked to provide, among other things, information about any of his dependants. In particular, if he was married, he was asked to provide details of his partner along with evidence of their address and immigration status.
5. On 14 April 2010 Mr Chen completed a case resolution checklist in which he identified his wife Yu He as his dependant, and provided the Home Office reference number which appeared on the notice of refusal of leave to enter decision served on her on 6 January 2006.
6. On 8 July 2010 Mr Chen was granted ILR, following a review of his case. It had been decided to grant him ILR exceptionally, outside the Immigration Rules: "this is due to your strength of connections in the United Kingdom, and your length of residence in the United Kingdom."
7. On 27 September 2010 the Case Resolution Team sent to Yu He, care of the appellants' solicitors, the same standard letter which had been sent out to her husband in April 2010. On 15 December 2011 the UK Border Agency explained to Yu He's local MP in writing that as she had claimed asylum in her own right, she was not a dependant upon her husband's application. On 12 September 2013 Yu He's solicitors sent a letter in which they said that if a decision was not made upon her case within 30 days an application for judicial review would be made.

8. An application for judicial review was made on or about 13 November 2013. The case advanced on behalf of Yu He was that the Home Office's delay in considering her case under the legacy scheme was unreasonable and unlawful. When her husband was given ILR in 2010 under the legacy scheme, she and her husband were a family unit, and her representatives had been requesting that she should be given leave in line with her husband since 2010. She had resided in the United Kingdom in excess of six years, and the Home Office policy contained in the enforcement instructions and guidance at paragraph 53.1.1 prima facie applied to her.
9. The appellants made their applications for entry clearance on 31 December 2013, while the judicial review proceedings were still pending. They had not been concluded by the date of decision.
10. The appellants' applications were refused on 11 February 2014. The letters submitted from their parents acknowledged that their mother did not have settlement status or limited leave as a partner. Accordingly, they did not meet any of the gateway requirements for entry clearance under paragraph 297(1), including the requirement contained in sub-sub-paragraph (f):

'One parent or relative is present and settled in the United Kingdom or being admitted on the same occasion for settlement and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care.'
11. In their grounds of appeal to the First-tier Tribunal, the appellants' representatives raised no argument under the Rules, but relied solely on the proposition that the decision was unlawful under Section 6 of the Human Rights Act 1988. They relied on the same case that had been advanced in the application for judicial review. If the sponsor's wife had been granted leave in line with the sponsor in 2010, she would now have settled status in the UK. The decision breached the appellants' rights to respect for family life. They were completely dependent on their parents, and they had a right to enjoy their family life together in the UK.
12. Following the refusal decisions, their mother was granted limited leave to remain on 22 May 2014 for a period of two and a half years.
13. On 3 September 2014 an Entry Clearance Manager gave his reasons for upholding the refusal decisions, notwithstanding the grounds of appeal and the additional evidence that had been provided. He could now see that the appellants' mother had been granted leave to remain until 2016. But she still held discretionary leave only. She was therefore not present and settled in the UK for the purposes of the Rules. Furthermore, it had not been shown and it was not contended that the appellants' father had had sole responsibility for their upbringing. So the appellant still did not meet the requirements of the Rules. Given that the sponsor's future in the UK was not guaranteed, the correct course of action for the appellants was to await the result of any proceedings and to reapply if their mother

became settled. Although this might cause some interference with their family life, it was the sponsor's decision to leave China and bring about the family's separation. So the refusal decision did not amount to an interference with the appellants' family life rights sufficient to engage Article 8 ECHR.

14. Either before the ECM review (and if so, unknown to the ECM) or after the ECM review, Yu He withdrew her application for judicial review: Yu He's witness statement dated 14 October 2014, paragraph 6.

### **The Hearing before, and the Decision of, the First-tier Tribunal**

15. The appellants' appeals came before Judge Lagunju sitting in the First-tier Tribunal at Sheldon Court, Birmingham on 20 October 2014. Miss Rutherford of Counsel appeared on behalf of the appellants. At the outset of the hearing, the judge granted permission to Miss Rutherford to amend the grounds of appeal to include consideration of paragraph 297(i)(f).
16. In his subsequent decision, she referred to the ratio of **Mundeba (S55 and Paragraph 297(1)(f)) 2013 UKUT 0088 IAC** at paragraph [11]. In paragraph [12], she summarised the case advanced by Counsel on behalf of the appellants:

“Counsel on behalf of the appellants relies on the respondent's failure to grant the appellants' mother leave in 2010 in line with their father under the legacy policy, to show the serious and compelling circumstances which make the appellants' exclusion undesirable. The sponsor was granted leave under the legacy policy on 6 July 2010 however despite being listed as a dependant, the appellants' mother was not granted leave in line with her husband. Despite repeated requests to reconsider and a judicial review application, she has not been granted the leave she seeks. Miss Rutherford of Counsel argues that although this situation relates directly to the mother of the appellants it also has a direct impact on the appellants. “
17. At paragraph [13], the judge said that after careful consideration of all the circumstances, she did not find the failure to grant their mother leave in line to be either serious or compelling. It was of course unfortunate that their mother's leave was not granted, but it was not a serious or compelling circumstance “which directly relates to the children.”
18. At paragraph [14], she observed that although Counsel blamed the respondent for “this error,” she had not been directed to any specific policy which confirmed that a dependent spouse was always to be granted in line with the main applicant. She further noted the respondent had not since sought to rectify the said mistake by granting her leave, neither had the respondent accepted that a mistake, administrative or otherwise was made, neither did the judicial review application assist with determining who was at fault.
19. The judge continued in paragraph [15]:

“I was informed the judicial review application was withdrawn following the grant of discretionary leave, which suggests that the matter was resolved

with an acceptable outcome for both sides. To suggest now that it was either a serious or compelling situation is to overstate matters. Had it been shown that the appellants' mother had been wronged or prejudiced or significantly disadvantaged in some way, perhaps there would have been a stronger argument for it being compelling or serious and having some direct effect on the children, however that is not the case as the matter appears to have been resolved amicably."

20. The judge found that the appellants had not discharged the burden of proving that they met the requirements of paragraph 297(1)(f), or any of the other alternative requirements under paragraph 297(1).
21. The judge then went on to consider the alternative claim under Article 8 ECHR. The appellants had not shown it would be unreasonable for them to remain in their country of origin. She accepted that Article 8(1) was engaged, as there was family life between the appellants and their parents. But the decision did not amount to a disproportionate interference with family life. Her reasoning was the appellants had thus far spent the majority of their lives in China and this was likely to consist of education, culture, family and friends. Although they had been apart from their parents, they had been able to continue to live their lives in China apparently without great difficulty. It would not therefore be in their best interests to uproot them from their lives in China.

### **The Application for Permission to Appeal to the Upper Tribunal**

22. Miss Rutherford settled the application for permission to appeal to the Upper Tribunal. She submitted that the judge's approach to **Mundeba** was flawed. The judge had no regard to the right of the appellants to be reunited with their parents, or that the starting point was their best interests were served by them being with both or at least one of their parents. At present they were with neither of their parents. Given the type of leave which the Secretary of State had granted to their mother, she would only be able to apply for settlement after ten years. As a consequence of this, and their respective ages, the appellants would never be able to meet the requirements of the Rules as children of parents who were living in the UK. But for the failure of the Secretary of State to grant their mother indefinite leave to remain, they would be entitled to join their parents here regardless of their ties to China. If both parents had ILR, the consideration mentioned by the judge in paragraph [21] would be irrelevant.
23. Alternatively, the judge had erred in her rejection of the evidence regarding dependants being granted ILR to remain in the UK in line with the main applicant. Whilst it was not explicit in chapter 53 of the enforcement instructions that the dependants were granted the same leave as the main applicants, it was implied.
24. Further, the judge placed too much emphasis on Yu He's failure to pursue a judicial review application. While it could be argued that the type of leave granted could have been challenged, the fact remained that by the

very act of granting her discretionary leave to remain, the Secretary of State was acknowledging that her future was now in the UK. But in view of the ages of the two appellants, they would not be able to apply for leave to enter the UK to join their parents because by the time Yu He was able to apply for ILR, they would be adults. In dismissing the appeal, the judge had failed to have regard to these matters, and if they were considered by another judge, there was a very real prospect that the appeal would be allowed.

### **The Grant of Permission**

25. On 26 January 2015 First-tier Tribunal Judge De Haney granted permission to appeal on all grounds raised.

### **The Rule 24 Response**

26. On 6 February 2015 a member of the Specialist Appeals Team settled a Rule 24 response on behalf of the Entry Clearance Officer. The grounds advanced a mere disagreement with a negative outcome to the appeal, and did not disclose any material arguable errors of law that would be considered capable of having a material impact upon the outcome of the appeal.

### **The Appeal Hearing**

27. At the hearing before me, Miss Rutherford directed my attention to the skeleton argument she had prepared for the hearing in the Upper Tribunal, and she sought to address my query as to whether the failure to grant the appellants' mother leave in line with her husband had been deliberate as opposed to accidental.
28. On behalf of the Entry Clearance Officer, Mr Smart submitted that the decision not to grant the appellants' mother leave in line with their father had been deliberate. He referred me to **Che v Secretary of State for the Home Department [2013] EWHC 2220 (Admin)**, **Geraldo and Others v Secretary of State for the Home Department [2013] EWHC 2763 (Admin)** and **SH (Iran) and Another v Secretary of State for the Home Department [2014] EWCA Civ 1469**. In the light of these authorities, it had been a wise decision for the appellants' mother not to have pursued her application for judicial review. He accepted that up to July 2011 the practice of the Secretary of State had been to grant ILR, rather than limited leave to remain, to applicants who had accrued six to eight years' residence; but, as the authorities showed, this did not mean that it was unlawful for the appellants' mother not have been granted ILR before there was a change of policy to granting applicants like her only limited leave to remain.

### **Discussion**

29. In **SH (Iran)** at paragraph [65], Davis LJ, giving the leading judgment of the court, said this:

“The position with regard to legacy cases on these particular points is now to be taken as laid to rest. There have been many decisions in the last two years on the salient points, all of which are in substantial accord. There is no separate legacy ‘policy.’ There is no basis for relying on delay as, in itself, a ground for obtaining leave to remain. 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. There is no basis for saying that there is a commitment on the part of the Secretary of State to ‘conclude’ the case either by effecting actual removal or by granting leave to remain.”

30. This authoritative statement by the Court of Appeal has ramifications for this appeal, as underlying the case for the appellants, both here and below, is the proposition that the appellants’ mother has been the victim of an historic injustice, in that she ought to have been granted indefinite leave to remain under the legacy “policy” at the same time as her husband was granted indefinite leave to remain under the same policy. Establishing this alleged historic injustice is an essential building block in the argument that there are compelling circumstances which make the children’s exclusion undesirable because, but for the alleged historic injustice, they would have qualified for entry clearance on the ground that both parents were present and settled in the UK.
31. But as the authorities provided by Mr Smart illuminate, there was no merit whatsoever in Yu He’s application for judicial review on the grounds of unreasonable delay. Moreover, the evidence disclosed to the First-tier Tribunal did not sustain an argument that (a) in the particular circumstances of her case Yu He had a legitimate expectation of being granted ILR at the same time as her husband was granted ILR, or (b) that it was only an administrative oversight on the part of the Secretary of State which had deprived her of this enhanced status.
32. Yu He had not sought leave to enter the United Kingdom as the dependant of her husband, but had sought asylum in her own right. Following the dismissal against her appeal against the refusal of asylum, and her appeal rights being exhausted, she was liable to removal. As she was not removed, she became eligible for consideration under the legacy programme. She had no legitimate expectation of a decision being made on whether to grant her leave to remain or to remove her being made by a particular end date. Although her husband was invited to give details of his dependants, no representation was made by the Secretary of State that any dependants that he had would be granted leave in line with any leave that was decided to be granted to him.
33. The appellants did not place any evidence before the First-tier Tribunal to show that in 2010 the Secretary of State was operating a policy of granting dependants with no status leave to remain in line with the grant of leave to the main applicant. Miss Rutherford accepts that chapter 53 of

the enforcement instructions do not in terms spell out such a policy. It was incumbent on the appellants to prove the terms of the policy relied upon. They did not do so.

34. The solicitors for Yu He did not in terms request the Case Resolution Directorate to make a decision on her legacy “claim” at the same time as making a decision on her husband’s claim, nor did they in terms request that a decision on her immigration status as a dependant on her husband be made at the same time as a decision was made on her husband’s legacy claim. The mere fact that her husband identified Yu He as his dependant and as being a fellow legacy claimant, when providing further information in support of his own legacy claim, did not trigger an obligation on the part of the Secretary of State to make a decision at that juncture on whether or not to remove Yu He or to grant her leave to remain.
35. In short, not only was the judge’s finding on the Rules one which was reasonably open to her on the evidence and on the law, no reasonable Tribunal properly directed could have reached any other conclusion. As submitted in the Rule 24 response, the grounds of appeal are essentially no more than an expression of disagreement with adequately reasoned findings.
36. It is convenient to deal with grounds 2 and 3 first, as they relate to the paragraph 297(1)(f). Ground 2, is that the judge erred in law by rejecting the evidence that if “Ms He’s case had been properly considered in July 2010 she would have been granted indefinite leave to remain.” In July 2010 Yu He had not in fact accumulated six years’ residence in the UK, and so she prima facie did not yet qualify for ILR under the policy or practice which was then in operation. But the principal way in which Miss Rutherford put the case before the First-tier Tribunal was that there was a policy in existence in 2010 whereby dependants were granted ILR in line with the main applicant, if he or she was granted ILR. Miss Rutherford further contended that it was through administrative error on the part of the respondent that the appellants’ mother had not been granted ILR in line with her husband in July 2010. The judge gave adequate reasons in paragraph [14] for rejecting both limbs of this argument. She was not directed to any specific policy which confirmed that a dependent spouse was always to be granted in line with the main applicant; and she was not shown evidence that the respondent had accepted that a mistake, administrative or otherwise, had been made.
37. Ground 3 is that the judge erred in law in placing significant weight upon Yu He’s failure to pursue her application for judicial review, once she had been granted discretionary leave to remain. Miss Rutherford argues that the judicial review claim became academic once Yu He had been granted limited leave to remain. But the maintenance of the judicial review claim was of crucial importance as it was only through the mother’s immigration status being elevated to that of ILR that she could support an application by the children for settlement pursuant to paragraph 297.



38. As was noted by Vice President Ockelton, sitting as a Deputy High Court Judge, in **Che** at paragraph [24], the legacy programme gave rise to a significant number of judicial review claims, which fell into two categories. One category of cases was where the claimant complained he had not received a legacy decision granting him leave to remain; the other category were cases in which the claimant had received a grant of leave and complained that he should have received a grant of indefinite leave to remain. It was Yu He's case in the judicial review claim that she should be treated consistently with those claims resolved before July 2011 when the Case Resolution Directorate granted ILR in legacy cases. So the fact that this claim was withdrawn following the grant of limited leave to remain fully justified the finding by the judge in paragraph [15] of her decision.
39. Ground 1 is that the judge's approach to the Upper Tribunal's decision in **Mundeba** was flawed.
40. In **Mundeba**, the Upper Tribunal held *inter alia* as follows:
- (iv) family considerations require an evaluation of the child's welfare including emotional needs. Other considerations come into play where there are other aspects of a child's life that are serious and compelling for example where an applicant is living in an unacceptable social and economic environment. The focus needs to be on the circumstances of the child in the light of his or her age, social backgrounds and developmental history and will involve enquiry as to whether:-
    - (a) there is evidence of neglect or abuse;
    - (b) there are unmet needs that should be catered for;
    - (c) there are stable arrangements for the child's physical care: and the assessment involves consideration as to whether the combination of circumstances are sufficiently serious and compelling to require admission.
  - (v) as a starting point the best interests of a child are usually best served by being with both or at least one of their parents. Continuity of residence is another factor; change in the place of residence where a child has grown up for a number of years when socially aware is important ..."
41. Miss Rutherford submits the judge fell into error by not considering the starting point to be that the appellants should with be their parents. This is not actually what **Mundeba** says. What it says is that as a starting point the best interests of a child are "usually best served by being with both or at least one of their parents". So the Tribunal in **Mundeba** expressly contemplates the possibility that there will be situations in which the best interests of a child are best served by remaining where they are, with other family members. The judge has given adequate reasons for finding that this is one of those cases.

## **Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision of the First-tier Tribunal stands. This appeal to the Upper Tribunal is dismissed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Monson