OUTER HOUSE, COURT OF SESSION

[2018] CSOH 40

P747/17

OPINION OF LORD TYRE

In the cause

YC

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Gill; Office of the Advocate General for Scotland

17 April 2018

Introduction

[1] The petitioner is a Chinese national who entered the United Kingdom illegally in 2011. In January 2013 she claimed asylum based upon fear of persecution on the ground of religious beliefs. Her claim was refused and her appeal against that refusal was dismissed. On 14 February 2013 she married PW, a Chinese national who had also had a claim for asylum refused. The petitioner and PW have two children, born in the UK in March 2013 and January 2015 respectively.

[2] On 11 May 2017, the petitioner submitted a further asylum and human rights claim under rule 353 of the Immigration Rules, on the basis of her religion as a Jehovah's witness

and on the basis of family planning in relation to the Chinese two child policy. As regards the latter, the petitioner stated that she feared that she would face forced sterilisation on return to China and also that she would face extortionate fines which she would not be able to pay. By letter dated 22 June 2017, the respondent rejected the application as not amounting to a fresh claim. Removal directions for the petitioner, PW and their two children were set for 9 August 2017.

[3] On 7 August 2017, agents for the petitioner submitted further representations under rule 353. The principal basis for these representations was the decision of this court in *YZ* v *Secretary of State for the Home Department* [2017] CSIH 41. In that case the First-tier Tribunal (FtT) had heard evidence from an expert witness regarding forced sterilisation practices in China, which evidence had been accepted despite being inconsistent with the relevant country guidance (CG) case. The Inner House held that the Upper Tribunal had not been entitled to overturn findings of fact by the FtT based on the expert evidence that the latter had heard and accepted. In the course of the opinion of the court (delivered by Lord Glennie), certain extracts were quoted from the expert's written report. It was submitted on behalf of the petitioner that her circumstances were on all fours with those of the applicant in *YZ*, and that she faced a real risk of persecution if returned to China in view of her breach of Chinese family planning regulations by having two children.

[4] By letter dated 8 August 2017, the respondent again decided that the matters submitted were not significantly different from the material that had been previously considered, and did not therefore amount to a fresh claim. That is the decision which is challenged in these proceedings. The petitioner and her family are still in the UK.

[5] The issue that arises for determination is whether the respondent erred in law in deciding that the petitioner had no realistic prospect of success before an immigration judge,

and in particular whether she erred in stating that the petitioner would not be entitled to rely, in support of her own appeal, on expert evidence led in *YZ*.

The petitioner's further submission

[6] The further submission submitted on behalf of the petitioner on 7 August 2017 referred to the decision of the Inner House in *YZ* and continued:

> "By way of background, this case involved an expert report being instructed which stated that in order for children to obtain hukou registration in China, a Chinese mother of an 'out of scheme' child would need to produce a 'certificate of sterilisation'. Although our client and her spouse were married at the time of the children's births, they did not have the required permission to go on and have a second child. It is noteworthy that the first child is a boy and thus restrictions apply on the birth of any second child.
>
> Without that certificate of sterilisation, the child would live a restricted life (regardless of payment of any fine)…
>
> Our client does not have any certificate of sterilisation and she does not have any intention to be sterilised. As a result, our client would be compelled to undergo treatment contrary to article 3 ECHR. We specifically refer to our client being forced to consent to insertion of an IUD in order to avoid a lesser harm to her children as a result of no hukou registration. In the case of [*YZ*] at the First-tier Tribunal, the above was accepted…
>
> It is submitted that striking similarities can be drawn between this recent Inner House case and our client's case. In particular, our client is a Chinese national who has breached the Chinese family planning regulations given she has two UK born children.
>
> In light of the above coupled with the wide reaching legal implications of this recent Inner House case, it is submitted that our client would clearly be at risk of persecution if returned to China in line with her breach of the strict Chinese family planning regulations."

[7] The expression "hukou registration" requires some explanation. The Court in *YZ* noted at paragraph 9 that "hukou" was described in the FtT decision in that case as follows:

> "a system of family registration, used to control internal migration in China between urban and rural areas. In 1958, the Communist government allocated 'rural' or 'urban' hukous to individuals. Today, the 'urban hukou' or 'rural hukou' is

> inherited and passed from parent to child. All social benefits and obligations derive from hukou, including entitlement to a birth permit, social security, contraception and medical care, education, housing, land and pension provision. Although it remains difficult to change hukou, the system has failed to prevent mass internal migration to the large cities in modern times, with hundreds of thousands of people living away from their hukou. Nevertheless, women of fertile age are obliged to send back regular pregnancy tests to their hukou area, seek birth permits there, and comply with local family planning regulation."

[8] The petitioner sought confirmation that the removal directions set for 9 August 2017 had been cancelled in light of the fresh submission.

The respondent's rejection of the submission

[9] In reaching her decision that the submission dated 7 August 2017 did not amount to a fresh claim, the respondent quoted extensively from the decision of the Upper Tribunal in *AX (family planning scheme) China CG* [2012] UKUT 00097. It is not in dispute that this is the extant CG case in relation to family planning in China. Among the passages quoted by the respondent from the country guidance in the preamble to *AX* were the following:

> "4. Breach of the Chinese family planning scheme is a civil matter, not a criminal matter.
>
> 5. Parents who restrict themselves to one child qualify for a 'Certificate of Honour for Single-Child Parents' (SCP certificate), which entitles them to a range of enhanced benefits throughout their lives, from priority schooling, free medical treatment, longer maternity, paternity and honeymoon leave, priority access to housing and to retirement homes, and enhanced pension provision.
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> 6. Any second child, even if authorised, entails the loss of the family's SCP certificate. Loss of a family's SCP results in loss of privileged access to schools, housing, pensions and free medical and contraceptive treatment. Education and medical treatment remain available but are no longer free.
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> 7. Where an unauthorised child is born, the family will encounter additional penalties. Workplace discipline for parents in employment is likely to include demotion or even loss of employment. In addition, a 'social upbringing charge' is payable (SUC), which is based on income, with a down payment of 50% and three years to pay the balance.

…

9. The financial consequences for a family of losing its SCP (for having more than one child) and/or of having SUC imposed (for having unauthorised children) and/or suffering disadvantages in terms of access to education, medical treatment, loss of employment, detriment to future employment etc will not, in general, reach the severity threshold to amount to persecution or serious harm or treatment in breach of Article 3.

…

11. In general, for female returnees, there is no real risk of forcible sterilisation or forcible termination in China. However, if a female returnee who has already had her permitted quota of children is being returned at a time when there is a crackdown in her 'hukou' area, accompanied by unlawful practices such as forced abortion or sterilisation, such a returnee would be at real risk of forcible sterilisation or, if she is pregnant at the time, of forcible termination of an unauthorised pregnancy. Outside of these times, such a female returnee may also be able to show an individual risk, notwithstanding the absence of a general risk, where there is credible evidence that she, or members of her family remaining in China, have been threatened with, or have suffered, serious adverse ill-treatment by reason of her breach of the family planning scheme."

[10] On the basis of the foregoing guidance, the respondent acknowledged that the petitioner's younger child might be considered to be an unauthorised child, and that the petitioner might be expected to pay a fine on return to China. However, the respondent observed that the petitioner had adduced no reason to suggest that the petitioner and her husband would not be able to support the family or that they would be unable to pay a fine. In any event this would not amount to a breach of their article 3 rights. It was therefore the respondent's opinion, based on *AX*, that neither the petitioner nor any dependant was likely to face a real risk of serious harm or persecution in relation to breach of the family planning scheme. Given the lack of new or significant evidence in support of the petitioner's case, the respondent considered that her representations, when taken together with the material previously considered, would not create a realistic prospect of success before an immigration judge, and therefore did not amount to a fresh claim.

[11] In relation to the petitioner's reliance upon the evidence led in *YZ*, the respondent stated her view as follows (decision letter, paragraphs 10 and 11):

> "10. …It is the position of the Secretary of State that [*YZ*] is not a 'country guidance' decision and therefore cannot be relied on as such. The Secretary of State's opinion is that the findings in the case of [*YZ*] were on their own merits and cannot been [sic] regarded as being of direct relevance to your application, and the expert report produced for that case has no direct relevance to the circumstances of your case. The Secretary of State is content that the relevant country guidance is the case of *AX*…, and this was considered fully in paragraphs 26-30 of her letter of 22 June 2017.
>
> 11. It is the opinion of the Secretary of State that you have adduced no new or significant evidence which would demonstrate that you and your family would be at any real risk of persecution by the Chinese authorities on your return to China. It is not accepted that you have demonstrated how 'social and official' pressure to be sterilised would reach the level of severity that it would amount to persecution, or amount to a breach of article 3… It remains the opinion of the Secretary of State that the onus is on you to adduce such evidence and you cannot rely on the opinion adduced by Ms Gordon as an expert in another case."

The status of country guidance cases

[12] The practice of the Immigration and Asylum Chambers of the FtT and Upper Tribunal in relation to country guidance is set out in paragraph 12 of the chambers' Practice Direction dated 10 February 2010 as follows:

> "12.2 A reported determination of the Tribunal, the AIT or the IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
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> (a) relates to the country guidance issue in question; and
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> (b) depends upon the same or similar evidence.
>
> 12.3 A list of current CG cases will be maintained on the Tribunal's website. Any representative of a party to an appeal concerning a particular country will be expected to be conversant with the current 'CG' determinations relating to that country.

> 12.4 Because of the principle that like cases should be treated in like manner, any failure to follow a clear, apparently applicable country guidance case or to show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law."

[13] The status of CG cases was considered by the Court of Appeal in some detail in *R (Iran)* v *Secretary of State for the Home Department* [2005] EWCA Civ 982. Brooke LJ noted that the version of the practice direction then in force had set out the purpose of publication of CG determinations which had been introduced about four years earlier. That purpose was consistency in the treatment of asylum seekers regarding matters not directly affected by their personal circumstances. The Court of Appeal referred with approval to the judgment of Ouseley J, then President of the Immigration Appeal Tribunal, in *NM and others (Lone women – Ashraf) Somalia CG* [2005] UKIAT 00076, which included the following passage:

> "139. Decisions of the Tribunal to that end had been made for a number of years. They were to be applied by the Tribunal itself and by Adjudicators unless there was good reason, explicitly stated, for not doing so. Failure to adopt that approach was an error of law in that a material consideration had been ignored or legally inadequate reasons for the decision had been given. The inconsistency itself with authoritative cases would be regarded by higher authority than the Tribunal as an error of law. There was a need to formalise that system so that parties knew where they stood, at least as the starting point for consideration of their circumstances, and for the Tribunal itself to bring forward those decisions which it had made, which it thought were representative and useful still, as a guide to country conditions.
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> 140. These decisions are now denoted as 'CG'. They are not starred decisions. Those latter are decisions which are binding on points of law. The requirement to apply CG cases is rather different: they should be applied except where they do not apply to the particular facts which an Adjudicator or the Tribunal faces and can properly be held inapplicable for legally adequate reasons; there may be evidence that circumstances have changed in a material way which requires a different decision, again on the basis that proper reasons for that view are given; there may be significant new evidence which shows that the views originally expressed require consideration for revision or refinement, even without any material change in circumstances. It may be that the passage of time itself or substantial new evidence itself warrants a re-examination of the position, even though the outcome may be unchanged. It is a misunderstanding of their nature, therefore, to see these cases as equivalent to starred cases. The system does not have the rigidity of the legally

> binding precedent but has instead the flexibility to accommodate individual cases, changes, fresh evidence and the other circumstances which we have set out."

[14] As is clear from the above passage, it is open to the FtT in a particular case to depart from country guidance where, for example, new evidence is led by a party which shows that the guidance no longer accurately states the factual position in the country in question. It is, however, incumbent upon the tribunal to explain why it has not followed the CG case; failure to do so or to state adequate reasons would be likely to constitute an error of law.

The *YZ* case

[15] The appellant in *YZ* was a Chinese citizen who had entered the UK as a student and who claimed asylum based on fear of persecution on return to China on account *inter alia* of her breach of China's family planning policies by having had two children born outside marriage. Her asylum claim having been refused, she appealed to the FtT. At the hearing before the FtT, the appellant led evidence from Ms Stephanie Gordon who was, at the time of giving evidence, completing a PhD thesis on statelessness in China resulting from denial of birth registration. In 2014 Ms Gordon had spent 6 months in China carrying out fieldwork surrounding the issue of unregistered children and birth registration, conducting interviews and compiling evidence on the subject of family planning issues concerning Chinese people. It was not disputed that she was qualified to give expert evidence about the Chinese family planning policy. For her part, the respondent relied on the country guidance in *AX*.

[16] The FtT judge found in fact that if the appellant were to be returned to China, she would be obliged to undergo sterilisation before being able to register her children by paying a fee. In so doing, the FtT judge accepted, in preference to the country guidance in

AX, Ms Gordon's evidence as to the likelihood of registration being denied unless the appellant could show that she had been sterilised. The FtT judge nevertheless held that the appellant's Convention rights would not be breached if she were returned to China.

[17] On appeal by the appellant to the Upper Tribunal, it was common ground that the FtT judge's reasons for refusing the appeal could not be supported. The Upper Tribunal went on, however, to make its own findings in fact that the children were not at risk of hukou denial, and that even if they were, the findings in *AX* established that millions live in that situation without suffering consequences giving rise to entitlement to international protection. The Upper Tribunal judge considered that no evidence had been shown to justify going beyond *AX* in that branch of the case. The Upper Tribunal judge commented on Ms Gordon's evidence as follows:

> "47. The report by Ms Gordon is based on a few examples and on rather sweeping assertions… The report does not bear out its contentions by reference to the specific evidence which might justify departing from the conclusions in *AX*.
>
> 48. In particular, there is no substantial evidence in the report by Ms Gordon or from any other source to show that sterilisation is carried out by force other than during local crackdowns, as found in *AX*."

[18] The appellant appealed to this court, which held that the Upper Tribunal had erred in law in opening up and reversing the FtT's finding in fact, reached on the basis of Ms Gordon's evidence, that the appellant would be obliged to undergo sterilisation before being able to register her children if she were returned to China. The court allowed the appeal, set aside the decision of the FtT, and replaced it with a decision quashing the respondent's decision refusing the appellant's claim for asylum. At the outset of the opinion, Lord Glennie emphasised the nature of the role of the court as follows (paragraph 5):

> "It is for the relevant tribunal – in the first instance the FTT and, on appeal, in certain circumstances, the UT – to determine the facts relevant to the resolution of the case before it. This court sits in an appellate capacity. It is concerned with the question whether either tribunal erred in law in reaching its decision. To answer that question in the present case, it is clearly necessary for this court to identify the evidence which was before the tribunals and to evaluate their treatment of it; however we do so not in order to enable us to form our own view of the facts but only for the purpose of considering whether either tribunal committed a legal error sufficient to require this court to intervene."

It is clear, therefore, that in reaching its decision to allow the appeal, the court did not in any way endorse or accept evidence given by Ms Gordon: that was not its role, but was the task of the FtT judge.

[19] The court did, however, in the course of its judgment (at paragraphs 16-18) find it relevant to quote three passages from the written report by Ms Gordon that had constituted her evidence to the FtT. In view of the argument presented in the present application, it is appropriate to reproduce these passages, together with certain further paraphrasing of Ms Gordon's opinion by the court:

> "16. …[Ms Gordon's] view… was that, if returned to China, the appellant would be punished for having her children out of wedlock, particularly since she would return still unmarried and without the father of the children. In paragraphs 31-42 she considered the likelihood of forced sterilisation or IUD insertion, noting (in paragraph 31) her understanding of what 'forced' sterilisation meant:
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> > 'My understanding is that 'forced' does not only refer to the women caught by authorities and physically submitted to undergo sterilisation – as was, not so long ago. It can also mean putting women and families in a situation where women must choose between submitting to sterilisation, and the legal identity of their child, or their entire family savings. These 'choices' should not be mistaken for free consent.'
>
> Women who refused to submit to sterilisation faced on-going problems across China (paragraph 32). As to the suggestion that forced sterilisation occurred only during 'local crackdowns', she said this (in paragraph 33):
>
> > '… there is a preoccupation both from the Home Office and legal representation about 'local crackdowns' to sterilise women. This is irrelevant in China – regardless of crackdown China has built a bureaucratic system to ensure certain documents are connected to birth registration (and thus

> hukou) of a child. A woman must have either an IUD or being sterilised and the document to prove this took place. Only with this document can a mother register her child's birth, and give her child legal documentation (the hukou) – necessary to access education. So the key point here is all year, every year, in all provinces, mothers require a certificate to register their child with the hukou. So regardless of a 'crackdown' the system ensures compliance through a functioning bureaucracy. This point became clear to me during my interviews – and through on going contact online with people over the last year, and is still a reality today.'

She then gave some examples (or anecdotes) to illustrate the problem which, she said (paragraph 37), 'encapsulate the situation faced by women, they feel helpless to refuse sterilisation because they know without doing so their child is denied a hukou – and thus denied education.'

17. In paragraph 38 Ms Gordon said that she had never heard of a woman refusing to accept an IUD in China – it is the normal expectation and is required after a woman's first child is born.

> 'A woman is usually expected to be sterilised after the birth of a second child, and [the appellant] would almost certainly be required to undergo sterilisation. I do not know of any example of a woman with two children in China who is not required, by local regulations, to accept either an IUD insertion or sterilisation. As the certificate of IUD insertion or sterilisation is usually necessary to register a child's birth, the state can effectively monitor and enforce this policy. As the mother can only register their child in their location of hukou registration they cannot go to another place to register their child. In my opinion, based on my broad first-hand research, it is highly likely that [the appellant] will need to be sterilised in order [to] be issued with a document necessary to obtain a hukou for her child. Again, the above assertions are based on my ongoing interviews with Chinese people.'

She then referred to the possibility of women bribing their way out of being sterilised, but we need say no more about this since it is not suggested on behalf of the Secretary of State that this would be an acceptable solution if the problem was as Ms Gordon asserted it to be.

18. Finally, on this point, at paragraphs 53-54 Ms Gordon reiterated that hukou denial (refusal of registration), both for not paying the social compensation fee and for refusing to be sterilised, was still an insurmountable barrier for some parents across China. It was a systemic problem. The implications for families could be devastating. They faced financial burdens by way of very heavy fines (she gave an illustration of the level of the fine as a multiple of annual income), might lose their jobs and might find themselves repeatedly detained and taken to court. Parents unable to pay a social compensation fee, and unwilling to accept an IUD or undergo sterilisation, all faced these problems."

Argument for the petitioner

[20] On behalf of the petitioner it was submitted that the respondent had acted unreasonably in determining that the petitioner would have no realistic prospect of success in an appeal to the FtT, and therefore in refusing to treat the claim as a fresh claim. As a consequence of the publication of the opinion of the Inner House in *YZ*, the evidence given by Ms Gordon and accepted by the FtT in that case was now known. The hypothetical immigration judge deciding an appeal by the present petitioner would be aware of Ms Gordon's evidence to the extent that it was narrated in paragraphs 16-18 of the Inner House's opinion. That evidence was of a generic nature, not peculiar to the facts of *YZ*. It would be open to such an immigration judge to rely on the accuracy of the court's summary of Ms Gordon's evidence, and to decide to accept it in preference to the extant country guidance in *AX* which was now some years old.

[21] If country guidance was demonstrated to be out of date, the judge was entitled to decide not to follow it. The Home Office commonly produced generic country information which could be referred to in the FtT and preferred to what had been said in an earlier but still extant CG case. Sometimes, as in *AA (Iraq)* v *Secretary of State for the Home Department* [2017] EWCA Civ 944, the parties were agreed that there was an error in the country guidance, and the court issued a corrected version as an appendix to its judgment. In the present case, the hypothetical judge would be entitled, on the basis of what was said in *YZ*, to reach a view on the credibility and reliability of Ms Gordon's evidence. Reference was made to rule 14(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, which permitted the FtT to admit evidence whether or not it would be admissible in a "civil trial" in the United Kingdom. It would therefore be possible for the

judge to conclude that the petitioner would have to obtain a certificate of sterilisation, and allow her appeal against removal to China.

Argument for the respondent

[22] On behalf of the respondent it was submitted that the hypothetical judge hearing an appeal by the petitioner would not be entitled to disregard the country guidance in *AX* in favour of evidence reported to have been given by an expert witness in another case. The purpose of the CG system was to ensure fairness and consistency by setting out a factual background against which first-tier appeals would proceed. The hypothetical judge would not have an expert opinion before him. All that he/she would have would be the brief excerpts from Ms Gordon's lengthy report quoted by the Inner House in *YZ*, and referred to in the fresh submission that the respondent had rejected. The respondent had not erred in her view that the petitioner would not be able to rely on the opinion of Ms Gordon in *YZ* for support in her own hypothetical appeal. Reference was made to the observations of Stanley Burnton LJ in *SG (Iraq)* v *Secretary of State for the Home Department* [2013] 1 WLR 41 at paragraphs 43-49. At the very least, it was not unreasonable for the respondent to reach this conclusion.

Decision

[23] In my opinion the submissions on behalf of the respondent are to be preferred. It is important to emphasise that the hypothetical judge hearing an appeal against refusal of the petitioner's latest claim would not have Ms Gordon's report before him (I use only the masculine pronoun for the sake of brevity). He would have no more than the excerpts from her report quoted by the Inner House, together with the court's summary of certain other

material in the report. He would not have an opportunity to form his own view as to the credibility or reliability of Ms Gordon's evidence, and it will be recalled that the court expressed no view on this. He would not have the benefit of informed submissions on behalf of the parties as to why her evidence should or should not be accepted as correct in fact. He would be unable to set the passages quoted by the court in the context of the report. He would be unable to assess whether a reading of the report as a whole might identify crucial differences between the circumstances of the appellant in *YZ* and those of the present petitioner. Despite the relaxation of the rules of evidence by rule 14(2), I find it very difficult to see how any fact-finder could base his decision on brief excerpts in an appellate judgment from the evidence of a witness in a different case.

[24] Further difficulties for the petitioner are created by the existence of the CG system. I have set out the purpose of the system which, broadly speaking, is consistency of treatment of asylum seekers. It is, of course, open to an applicant to lead evidence that a particular aspect of country guidance is wrong or out of date, and it is equally open to the tribunal to accept that evidence in preference to country guidance, provided that it gives proper and adequate reasons for so doing. But it seems to me that it would entirely subvert the CG system if a claimant were able to search through reported appeal decisions for passages of evidence which appear to support an argument that a relevant CG case should not be followed. Far from promoting consistency of treatment, such an approach would lead to considerable uncertainty, as parties would no longer know where they stood as regards the starting point of the tribunal's findings in fact. Where a particular aspect of country guidance is thought to have become inaccurate, the solution is to amend the guidance in an appropriate appeal. Ms Gordon's evidence in *YZ* has not, of course been awarded CG status; if it had been, subsequent tribunals would have had the benefit of a tribunal's

identification of the critical matters found to have been proved, rather than a small group of excerpts which happen to have been most relevant to the circumstances of a particular appellant.

[25] Couched in terms of the Practice Direction, it seems to me that a decision by the hypothetical judge to disregard the country guidance in *AX* on the basis only of the excerpts from Ms Gordon's evidence in *YZ* that were either directly quoted or summarised by the court would be likely to constitute an error of law. Putting the matter at its lowest, the respondent's decision that the petitioner would not be entitled to rely on that evidence in her own appeal was one that she was entitled to reach and not therefore unreasonable or irrational. There is accordingly no ground upon which the court ought to interfere.

[26] For these reasons, I shall repel the petitioner's pleas in law, sustain the respondent's first and second pleas in law, and refuse the application.