Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers OA/21637/2012
OA/21638/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 November 2013	**On 16 December 2013**

Before

MR JUSTICE CRANSTON
UPPER TRIBUNAL JUDGE PINKERTON

Between

SHUNRONG CHEN
YANTING DENG

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants Mr Manndred Adolphi of Saintta International Lawyers
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officers

DETERMINATION AND REASONS

1. This is an appeal against a determination of Judge Broe sitting in the First-tier Tribunal dated 12 August of this year. The judge dismissed appeals from the

appellants, who are a mother and daughter in China. The first appellant, who is 31 years old, applied for entry clearance as a wife of the sponsor, Mr Deng, who is here today.

2. The Entry Clearance Officer refused the application in October last year because he was not satisfied that the appellant would be maintained and accommodated without recourse to public funds. In the application form the first appellant said that she and her daughter had never left China before. Her husband was a British citizen. It appears, we say by way of digression, that apparently he had been given indefinite leave to remain under the so-called legacy policy. The application form said that the two of them, a mother and daughter, were sent money by the sponsor husband of about £400 a month. Apparently the first appellant does not work. In Appendix 1 of the application, the first appellant said that the sponsor worked as a self-employed decorator earning about £2,000 a month. He had savings of about £3,400. She had savings of approximately £9,000. She said that the sponsor lived with his sister and a husband in a rented house which had four bedrooms. The application form also said that the sponsor had been a self-employed decorator since 1 September 2011, and his preceding seven months' income was some £14,282.

3. As we have said the Entry Clearance Officer refused the applications. The Entry Clearance Office said that he was satisfied that the appellants met the suitability requirements and that the first appellant was eligible for entry clearance as a partner. He was also satisfied that she met the English language requirement. However, he refused the applications under paragraph EC-P.1.1(d) of Appendix FM of the Rules. Under the Rules the appellant had to show that the sponsor had a gross income of £22,400, and the evidence provided by the appellant showed that his income was less than that, £16,782 per annum. As he was self-employed the appellant was required to submit evidence of tax paid and payable, an annual self-assessment and a statement of account together with proof of registration as self-employed with Her Majesty's Revenue and Customs. She had not done that. There was no evidence of the sponsor's previous salaried employment. Her solicitors had said that his P60 had been lost. There was no evidence that the sponsor was paying class 2 national insurance contributions. There was no evidence to show that the funds in the sponsor's account came from his self-employed earnings.

4. Subsequent to that the appellant gave a notice of appeal in late October last year. The lawyers acting on her behalf and on behalf of her daughter said that she had provided a letter from Her Majesty's Revenue and Customs bearing the sponsor's registration number, and his income from self-employment "should be about £22,480". There were certain documents provided including a letter from the sponsor's accountants, his online tax return for 2011 to 2012, a letter from the tax authorities, a notice of national insurance contributions and a self-assessment statement dated 2 December 2012.

5. Before the judge, it was said that the sponsor had never had recourse to public funds. He was employed as a painter and decorator. He produced a copy of a land registry document before the Tribunal which showed that he and another person had

acquired a lease upon a flat in London in May of this year at a cost of £130,000. He said that friends had provided financial help when he bought his house about two months ago. Before then he had rented accommodation costing some £600 a month. His evidence was that in October he was earning "not that much, about £500 per week".

6. The judge first considered what version of the Immigration Rules applied. The first application was made before the Rules had changed. The judge said that he was satisfied that the first application was rejected because the wrong forms had been used. If that was not the case, then the appellants would have had no need to submit further forms. Therefore the judge concluded that the new Rules, which came in after the first application, applied.

7. The judge then went on to consider the evidence in relation to the sponsor's income. He noted that the letter the accountants had sent said that his total income from self-employment from 1 September 2011 to 5 April 2012 was £14,282. That was the figure in the tax return, where there was also a reference to the income from employment of £2,500, said to be income from his employment with Sky Decoration Limited. There was no documentary evidence, the judge noted, of this employment. The judge then said that the total income for the tax year 2011 to 2012 was therefore £16,782. The sponsor had provided a self-assessment statement showing a tax payment of some £2,500. The judge said this at paragraph 31:

> "There is a paucity of evidence generally in this case and no further evidence of the sponsor's business or income. There is no evidence of his income from April 2012 to the date of the decision or thereafter. I find this surprising, because that financial year ended almost four months ago. He should have been able to demonstrate his income for that period with accounts and tax returns but has not chosen to do so. The savings to which the appellant refers are insufficient to meet the requirements set out above. The only evidence of his income therefore shows it to be £16,782 per annum. These appeals cannot therefore succeed under the Rules."

8. The judge then referred to Article 8. Taking as a guide the well-known case of **Razgar**, the judge said that the first question was whether there was an interference with the appellant's rights. He said there was no dispute about the marriage and he was satisfied that family life existed. He therefore accepted, as well, that there had been communication between the sponsor and the appellants. He noted that the sponsor was in this country and the appellants in China, but that was the life that they had chosen, and he was not persuaded that the decisions amounted to an interference with the right to enjoy it. He then went on and said that if he were wrong in that, he found the decisions to be lawful and for a legitimate purpose. He therefore concluded that the interference was proportionate.

9. The Rules in this case are contained in Annex FM of the Immigration Rules at E-ECP3.2 and the evidential requirements are contained in Appendix FM-SE, in particular at paragraph 7. The notice of appeal first of all contended that the judge

was in error in being satisfied that the wrong forms had been used. No reasons had been given as to why the Tribunal had come to that conclusion. In our view that ground goes nowhere because the judge gave a very good reason as to why he had come to that conclusion, namely if the right forms had been used there was no reason for the Entry Clearance Officer to demand submission of a new application.

10. The grounds then address the issue of the financial requirements. The submission in the reasons for appealing invoke the decision of **MM [2013] EWHC 1900**. Those grounds are further advanced in the skeleton argument which Mr Mandred Adolphi, who was not able to appear for the appellants this afternoon because of another commitment. Essentially the submission is that the Tribunal had found that the sponsor's total income was £16,782, and that the tax had been paid on that. It cannot therefore have been correct for the judge to say that there was a paucity of evidence. The decision ran contrary to the weight of the evidence.

11. The grounds mention that the sponsor had just received an annual account which had been completed recently by his accountant and there were a letter and tax payments in relation to that. We note that that is information which came after the decision and therefore cannot be taken into account. The grounds also mention that the judge failed to consider that the sponsor had purchased the new home. We again comment that that is irrelevant under the Rules.

12. Turning to the **MM** point, the submission made in both the grounds and in Mr Adolphi's skeleton argument is that this sponsor had a total income of £16,782, had paid taxes on that and that amount was above the minimum income level for an adult on a 40 hour week. The view that Mr Justice Blake had adopted, especially at paragraph 124 of the **MM** judgment, was that there should be a focus on the £13,400 level which had been identified as the lowest maintenance threshold by the Immigration Advisory Committee, close to the adult minimum wage for a 40 hour week.

13. Mr Adolphi in the skeleton argument submits that the sponsor was a British citizen making an application which, as Mr Adolphi puts it, was the exercise of a right which was guaranteed by law, and the Entry Clearance Officer must justify the grounds that render exclusion lawful. Moreover, there is reference to the provision in Section 55 of the Borders, Citizenship and Immigration Act 2009 in relation to the position of the second appellant; In other words, the daughter.

14. In our view it is clear that this appellant falls short of the Immigration Rules in relation to the points identified by Mr Justice Blake at paragraph 124 of the judgment in **MM**. The appellant falls short in a number of respects. There is not the savings identified at (ii). There are no third party undertakings. We note that the sponsor was given financial help by friends to buy the lease of the house. The first appellant is not working in China, so there was no evidence about her earning capacity in this country. We, like the judge, are troubled by the evidence, or rather the paucity of evidence, about this sponsor's income. There was the surprising assertion (recorded by the judge at paragraph 15 of the judgment) that the sponsor's income was over

£22,000 per annum. Nothing in the papers supports that. Moreover, as the judge noted, there was no evidence produced before him as to the income for the period 2012 to 2013 (see paragraph 31 of his judgment). Before us today Mr Deng has asserted that he has provided evidence relating to his income for that year, which he asserts is some £25,000 and he has, he said, paid tax on that. That of course cannot come into our consideration today because that is evidence post the decision by the judge.

15. We have concluded that if Article 8 does have a separate purchase in this case, we cannot fault the balancing exercise engaged in by the judge. In our view, it is important in that Article 8 assessment that the income selected in the Rules reflects what the Secretary of State regards as a legitimate aim of preventing burdens on taxpayers in the long term, and promoting good integration of immigrants into the community.

16. We of course must give considerable weight to the fact that the sponsor is now a British citizen. In terms of assessing the overall proportionality of the impact of the other features of this case, we have come to the conclusion that if the judge had addressed the analysis which Mr Justice Blake adopted in the **MM** case, the proportionality balancing exercise would nonetheless have come out against the interests of these appellants.

17. On that basis, we dismiss the appeals.

Signed Date

Upper Tribunal Judge Pinkerton