Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/15834/2013
OA/15835/2013

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 20 October 2015	**On 5 November 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

HEYU CHEN
ZHENGENG CHEN
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER– BEIJING

Respondent

Representation:

For the Appellant: Mr J Walsh instructed by Stephen & Richard Solicitors
For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are mother and son who were born on 21 February 1973 and 4 June 1995 respectively. They are citizens of the People's Republic of China. On 17 May 2013 they each applied for entry clearance to join the sponsor, Yujin Chen who is respectively their husband and father.

2. On 28 June 2013, the Entry Clearance Officer refused each of the applications. In relation to the first appellant, the ECO was not satisfied that she met the "partner" requirement in E-ECP of Appendix FM of the Immigration Rules (HC 395 as amended). First, the ECO was not satisfied that the relationship between the first

appellant was a genuine and subsisting one as required by E-ECP2.6. Secondly, the ECO was not satisfied that the appellant met the financial requirements in E-ECP3.1 in that she could not demonstrate that the sponsor's annual income was at least £22,400. The second appellant's application for entry clearance was refused in line with that of his mother.

The Appeal to the First-tier Tribunal

3. The appellant's appeal to the First-tier Tribunal. In a determination dated 15 July 2014, Judge A W Khan dismissed the appellants' appeals. It was accepted before Judge Khan that the appellants could not succeed under the Immigration Rules as the sponsor's income was only £12,162.47 and therefore fell £10,237.53 short of the required amount under Appendix FM of £22,400. However, Judge Khan accepted that the relationship between the first appellant and sponsor was a genuine and subsisting one and that they intended to live together permanently. As a result, he went on to consider whether the appellants could succeed under Art 8 of the ECHR despite the fact that the sponsor did not have the required income under the Rules. In the light of the Court of Appeal's decision in R (MM (Lebanon) and Others) v SSHD [2014] EWCA Civ 985 Judge Khan concluded at para 26 that:

> "I am bound to dismiss the first appellant's appeal because she could not meet the minimum requirements of the Rules at the date of the decision and it follows that the second appellant's appeal also fails. The Art 8 appeal must fail in the light of the Court of Appeal's decision."

Consequently, he dismissed each appellant's appeal under Art 8.

The Appeal to the Upper Tribunal

4. The appellants sought permission to appeal to the Upper Tribunal on the basis that the judge had been wrong in law to conclude that the appellants' appeals fell to be dismissed because of the Court of Appeal decision MM and Others. The grounds argued that the Court of Appeal's decision had been handed down after the date of the hearing and the appellants had not been given an opportunity, through their Counsel, to make any submissions that the Court of Appeal's decision did not require the dismissal of their appeals under Art 8.

5. On 21 August 2014 the First-tier Tribunal (Judge Fisher) granted the appellants permission on that ground.

6. Following the grant of permission, on 20 July 2015 the Vice President of UTIAC issued directions to the parties, in particular requiring the appellants to submit within fourteen days of the direction "the submissions they would have made in relation to MM".

7. Under cover of letter of 29 July 2015, the appellants' legal representatives submitted, in response to those directions, a document drafted by the appellants' Counsel, Mr Walsh in which it was argued that the Court of Appeal's decision in MM and others did not preclude a consideration of whether an individual's Art 8 rights were

breached despite a failure to meet the financial requirements under the Rules. At para 7, the argument is put as follows:

> "The Court of Appeal in *MM* recognise that individual decisions may be amenable to an argument that they are disproportionate in their circumstances notwithstanding that the failed challenge to the lawfulness of the regime itself on which the decisions relied (para.161). The appellant submits that the decisions under appeal were disproportionate and the judge's assessment of that argument was flawed in that he considered that the holding by the Court of Appeal in *MM* that the scheme was lawful disposed to the argument. It did not do so."

8. In para 6 of the response are set out a number of factors which would have been relied upon under Art 8: the genuineness of the relationships; that the second appellant would no longer be able to present an application for entry clearance as a child as he would be an adult and that would "lead to the break up of a family unit"; and

> "the circumstances were such that despite the genuine (*sic*) of the relationships having been established and the financial threshold is capable of being met, the passage to (*sic*) time precluded the Second Appellant from qualifying for entry under the Rules as he is no longer a minor".

9. Thus, the appeals came before me.

Discussion

The Error of Law

10. On behalf of the respondent, Mr Diwnycz accepted that the judge should have considered Art 8 and whether the Entry Clearance Officer's decisions were disproportionate. He accepted that the decision of the Court of Appeal in MM and Others did not, contrary to what was said by the judge in para 26 of his determination, require that the appellants' Art 8 appeals be dismissed simply because the first appellant could not meet the minimum income requirements under the Rules. Mr Diwnycz did not seek to sustain the judge's decisions to dismiss the appeals under Art 8 and both representatives invited me to remake the decisions under Art 8 and I heard submissions from both representatives on the merits of the Art 8 appeals.

11. In the light of Mr Diwnycz's position, it is not necessary to expand at length upon the error of law in the judge's determination. It suffices to say this. The Court of Appeal in MM and Others decided that the minimum income requirements in Appendix FM were not necessarily inconsistent with Art 8 of the ECHR. In that regard, the Court of Appeal reversed the decision of Blake J in the Administrative Court ([2013] EWHC 1900 (Admin)). As the Court of Appeal noted at [164] of its judgment, it was not concerned with the "individual cases" and whether the new minimum income requirements produced a harsh result such that there were "exceptional circumstances" which established a breach of Art 8.

12. In that regard, therefore, Judge Khan misunderstood the effect of the Court of Appeal's decision in MM and Others and was wrong to conclude that the appellants' appeals necessarily had to be dismissed because of that decision. As was common ground before me, Judge Khan should have considered Art 8 and, in particular, whether there were "compelling circumstances" such that the decisions produced an unjustifiably harsh consequence for the appellants (see R (Nagre) v SSHD [2013] EWCA 720 (Admin); MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Singh and Khalid v SSHD [2015] EWCA Civ 74).

13. Consequently, I am satisfied that Judge Khan erred in law in dismissing the appellants' appeals under Art 8. Those decisions cannot stand. They are set aside and I now move to remake the decisions.

Re-making the Decisions

14. The appellants rely exclusively upon Art 8. They argue that it is a disproportionate interference with the respect for their family life with the sponsor to preclude them from living with him in the UK.

15. In applying Art 8, I adopt the five stage test set out in R(Razgar) v SSHD [2004] UKHL 27 by Lord Bingham of Cornhill at [17]. Lord Bingham was considering Art 8 in the context of removal decisions but, in principle, subject to linguistic adjustments the same principles apply in entry clearance cases. There, Lord Bingham identified the following five questions which I summarise as follows:

    (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life?;

    (2) If so, will that interference have consequences of such gravity as potentially to engage the operation of Art 8?;

    (3) If so, is such interference in accordance with the law?;

    (4) If so, is such interference necessary in a democratic society for a legitimate aim set out in Art 8.2?; and

    (5) If so, is such interference proportionate to the legitimate public aim sought to be achieved?

16. The burden of proof is upon the appellants to establish on a balance of probabilities that their Art 8 rights are engaged. Thereafter, it is for the respondent to justify any interference (or disrespect). The Art 8 issue must be determined on the facts and circumstances as they were at the date of decision, namely 28 June 2013 (see, s.85A(2) of the NIA Act 2002).

17. The essential facts are not in dispute. None of Judge Khan's findings of primary fact were challenged before me.

18. The sponsor married the first appellant in China in January 1993 although it was not registered until 2012.

19. The sponsor came to the UK in 2000. He did not return again to China until January 2012 and then did so again in 2013 and 2014 to visit his wife and son.

20. Judge Khan accepted that the marriage between the first appellant and sponsor was a genuine and subsisting one and that they intended to live together permanently. Likewise, it was not suggested that the relationship between the second appellant and sponsor was other than a genuine one of parent and child.

21. The sponsor was granted indefinite leave to remain in the UK in 2010. However, it is not clear from the papers and neither representative addressed me on this issue as to what was the sponsor's immigration status between 2000 when he came to the UK and 2010 when he was granted ILR.

22. I have already alluded to the sponsor's financial position and that he earned £12,162.47 in the relevant year immediately preceding the application which was over £10,000 short of the required minimum financial requirement of £22,400 under the Rules. It was accepted before me that the appellants could not succeed under the Rule because of this.

23. Judge Khan also accepted that the second appellant could not succeed under Art 8, he would in the future have to make an application as an adult having reached the age of 18, and the effect would be that he would be unlikely to obtain entry clearance.

24. On the basis of the evidence and these facts, I find that the appellants have established "family life" with the sponsor. Further, I am satisfied that the refusal of entry clearance would interfere with that family life if the appellants are not allowed to join the sponsor. Consequently, I am satisfied that Art 8.1 is engaged. (On private life see below.)

25. As regards Art 8.2, the ECO's decisions are clearly in accordance with the law, namely the Immigration Rules. Further, the decisions pursue a legitimate aim, namely the economic wellbeing of the country.

26. The crucial issue in these appeals is whether the interference that I have identified is proportionate.

27. In approaching that issue, I must strike a fair balance weighing the public interest against the rights and interests of the appellants and the sponsor (see, Razgar *per* Lord Bingham at [20] and Beoku-Betts v SSHD [2008] UKHL 39). At the date of decision, namely 28 June 2013 the second appellant was no longer a child as he had reached his 18th birthday on 4 June 2013 prior to the decision. His "best interests" were not, therefore, engaged on the basis of him being a minor. Indeed, neither representative made any submission in respect of the second appellant's best interests as such.

28. As the appellants cannot meet the requirements of the Immigration Rules, as I noted above, they must establish that there are "compelling" circumstances such that the refusal of entry clearance would produce an unjustifiably harsh consequence.

29. Further, in considering the issue of proportionality, I must "have regard" to the statutory factors set out s.117B of the Nationality, Immigration and Asylum Act 2002.

30. In his submissions, Mr Walsh relied upon a number of factors which he invited me to take into account and conclude that the respondent's decisions were disproportionate.

31. First, he reminded me that the sponsor had been in the UK since 2000 which was thirteen years at the date of decision. Mr Walsh relied upon para 19 of the sponsor's statement dated 2 July 2014 in which the sponsor stated that it would be unreasonable to expect him to leave the UK and return to China. That paragraph is as follows:

> "19. It would be unreasonable to expect me to leave the UK and return back to China if my wife and son's refusal of their settlement application is upheld. My life is in the UK now and I have integrated into the local community and now lead the British way of life. I have a secure job, secure income and a secure home. If I was expected to return to China to join my family, I would lose all of this stability including the finance which is currently supporting my family. I have many friends in the UK who have been helpful and supported me during difficult times. Therefore my private life has been in the UK since the last 14 years and I should not be expected to return to China to live there. Moreover, the conditions attached to my permanent status require me to reside in the UK and not be absent for more than 2 years. This would mean I would have to travel back and forth to see my wife and child, which is not only costly but unreasonable. I should not be expected to do this since it would interfere with my private life in the UK."

32. Secondly, Mr Walsh relied upon the fact that the relationships between the first and second appellants on the one hand and the sponsor on the other were genuine ones.

33. Thirdly, Mr Walsh submitted that the effect of refusing entry clearance to the second appellant would be to split up the family unit because there was a reduced chance of the second appellant succeeding in any future application as an adult.

34. On behalf of the respondent, Mr Diwnycz submitted that the separation between the sponsor and appellants was "elective". He submitted that the sponsor had chosen to come to the UK and had left both appellants behind in China. They were, he submitted living apart out of choice and had been doing so for most of the second appellant's life. Mr Diwnycz submitted that it was not disproportionate to refuse entry clearance given that the appellants lacked the required financial resources under the Rules and there was no requirement to facilitate their entry to the UK.

35. I accept that the sponsor has lived in the UK since 2000 and, at the date of decision, that was some thirteen years. I accept, although no specific submissions were made in relation to this that he will no doubt have built up a private life in the UK over those years. No submissions were, however, made as to the nature and extent of that

private life. However, I do not accept that it would be unreasonable to expect him to return to China to live with his wife and son. The fact that he has ILR does not, in the circumstances of these appeals, lead me to conclude that it would be unreasonable for him to live in China with his family. Given that he has, since obtaining ILR, returned to China on three occasions to spend time with this family I see no reason why he could not do so on a permanent basis. No protection issues or other factors concerned with living in China were raised apart, that is, from the sponsor's evidence that he has integrated into the local community and has a secure job, income and home. Whilst he would, obviously, forego that security in the UK if he returned to China, there is nothing in the evidence to suggest that he would not be able to financially and otherwise sustain his family life there.

36. As Mr Diwnycz submitted, the separation between the appellants and sponsor is entirely elective. I was not told why the sponsor came to the UK in 2000 but whatever the reason was he remained here for 12 years without visiting his family. His son was born in 1995. He therefore did not see his son between the ages of 5 and 17. He has only subsequently seen him on a few occasions when he has returned to China since obtaining ILR in 2010. That is equally the case in respect of his relationship with his wife. The first appellant and sponsor had no expectation when the sponsor came to the UK in 2000 that they could continue their family life in the UK.

37. I accept Mr Walsh's submission that the second appellant will, if not granted entry clearance on this application, have a much reduced chance of obtaining entry clearance as an adult. That, however, is not in my judgment a significant factor. The reason why the second appellant cannot succeed under the Rules in this application is because of the minimum financial requirement reflecting the public interest in those coming to the UK having sufficient financial means to support themselves. The plain fact of the matter is that in any future application as an adult the requirements of the Rules, which it is suggested the second appellant will have difficulty in meeting, simply reflects a continuing, albeit different, aspect of the public interest, when the individual is an adult. I do not consider that the fact that the second appellant is unlikely to succeed in an application under the Rules in the future adds any significant weight to his claim to be admitted as a result of this application when he cannot meet the requirements of the Immigration Rules now. In any event, he is now an adult and either his mother can remain (as she has done since 2000) in China or, alternatively, the second appellant (now aged 20) can continue to live in China. I was not directed to any evidence to suggest that he could not reasonably remain there.

38. In my view, therefore, it would not be unreasonable to expect the sponsor to return to China to continue his family life. In any event, if the family is, as Mr Walsh submitted, effectively separated I am not satisfied that there are any compelling circumstances to outweigh the public interest. The fact of separation continues the status quo which the first appellants and sponsor elected to create. They have lived apart for thirteen years on that basis. No evidence was drawn to my attention that that separation had produced any demonstrable harm to the second appellant or the

first appellant. It is, no doubt, a difficult and challenging situation for the appellants and sponsor. However, it was their choice.

39. By virtue of s.117B(1) the maintenance of effective immigration control is in the public interest. No submissions were made as to whether the appellants could speak English or would be financially independent given the sponsor's income of around £12,000. For the purposes of s.117B(2) and (3) even if both are satisfied, that provides no positive right to come to the UK and does not diminish the public interest in effective immigration control (see Forman (ss.117A-C considerations) [2015] UKUT 412 (IAC)). Likewise, to the extent that s.117B(4) and (5) can be applied to the "private life" of the sponsor, I was not told of his immigration status between 2000 and 2010. However, at best it was "precarious" and so by virtue of s.117B(5) "little weight" is to be given to his private life established at that time.

40. Consequently, whether the sponsor returns to China (as I find it would be reasonable for him to do) or continues to remain in the UK as he has done so since 2000, I am not satisfied that there are "compelling" circumstances such that the consequences to the first and second appellants of being refused entry clearance is unjustifiably harsh.

41. For these reasons, the appellants have not established that at the date of decision the ECO's decisions to refuse them entry clearance breached Art 8 of the ECHR.

Decision

42. The decisions of the First-tier Tribunal to dismiss each of the appellants' appeals under Art 8 involved the making of an error of law. Those decisions are set aside.

43. I remake the decisions dismissing each of the appellants' appeals under Art 8 of the ECHR and, as is accepted, under the Immigration Rules.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

A Grubb
Judge of the Upper Tribunal