Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/03712/2014
OA/03543/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 5th August 2015	**On the 7th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

SHUYING LIU
YUWEI LU
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M Adophy, Saintta International Lawyers UK
For the Respondent: Mr S Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by joint Appellants Shuying Liu and her son. They applied to enter the UK as the spouse and child of the Sponsor. The application was refused and they appealed. The basis of the refusal was that they did not meet the Immigration Rules and there was no evidence that they were married or that their relationship met the

requirements of Appendix FM. A decision was reserved with regard to the maintenance requirements under the rules and in the outcome in the Court of Appeal of the case of MM.

2. The appeal was heard by First-tier Tribunal Judge Wright sitting at Hatton Cross on the 17th March this year. In a decision promulgated on the 1st April 2015 he dismissed the appeal. The findings were that there was no evidence that the parties were married and there was no evidence that they had cohabited. Following the departure of the Sponsor in 2001 there is only evidence of a two week visit in 2013 and it was also found with regard to maintenance that not only had the Sponsor not provided the specified evidence required to prove maintenance but that the P60s which had been produced late in the day were not in fact reliable.

3. In any event the combined total shown on the P60s showed combined earnings of £22,040 which is short of the £22,400 required to meet the requirements of Appendix FM with regard to maintenance for one adult and one child.

4. The Appellants sought permission to appeal to the Upper Tribunal in grounds which made three points. The first was that the finding that the relationship requirements had not been met. This was dealt with at paragraph 18 of the decision and it was suggested that the Judge had erred with regard to the evidence and the assessment that had been made. The second ground was that the finding that the P60s were not reliable documents and that that had not been put to the Sponsor. Thirdly it was stated that the First-tier Judge errs as a matter of law in respect of his article 8 assessment, "FtT fails to explain sufficiently how the Immigration Rules in this instance amount to a complete code", and it was then suggested that he erred in his public interest assessment with regard to article 8.

5. The application was considered by Judge Levin, who in his decision of the 19th May rejected the complaints made in relation to the relationship and Appendix FM-SE but found that it was arguable that the Judge's finding at paragraph 27 that the rules provided a complete code was wrong as the Judge had accepted that the Sponsor was the second Appellant's father. Permission therefore was granted on the third ground only.

6. That ground does not reflect what was said by the Judge at paragraph 27 of his decision, which I will now quote in full:

> "In the case of the other/second Appellant it could be argued that article 8 is engaged because it is not disputed that he is the Sponsor's son and because he failed to meet the relevant relationship requirements of the rules simply due to his mother's failure under the same. However, I do not actually consider that there are compelling circumstances here not sufficiently recognised under the rules or, put another way (see paragraph 17 of Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 00063 [Coker UTJ], that refusal of the second Appellant's application results in unjustifiably harsh consequences such as to be disproportionate under article 8 (applying the five stage Razgar test concluding with the proportionality balancing exercise and answering the first four questions in the affirmative with the public interest in maintaining

> effective immigration control being as strong as usual and having regard, as I must, to the relevant public interest considerations in the new section 117B of the 2002 Act as amended on the 28th July 2014 in the light of Dube and seeking to strike a fair balance as I must pursuant to section 6 of the Human Rights Act 1998 and in so doing taking into account here the recent case of Mostafa (Article 8 in entry clearance cases) in the light of the financial requirements of the rules remaining unmet, the Sponsor and the second Appellant having lived apart since July 2001 even on the Sponsor's own account when the Sponsor came to the UK except for the period of the Sponsor's short visit in 2013 of two weeks, the availability of modern means of communication as well as possible further visits to the second Appellant and the complete lack of any emotional dependency."

7. It is clear from that paragraph that the Judge did not consider that the rules were a complete code. Having considered all of the circumstances and having summarised them again in the paragraph I have just quoted it is clear that he found that the circumstances of the Appellants were not such that they were sufficiently compelling to be considered independently under article 8.

8. In any event the Appellants could not show that they met the financial requirements. Those have to form a fundamental consideration with regard to the public interest given the public interest in the maintenance of the economic wellbeing of the UK as set out in the Immigration Rules and in particular Appendix FM.

9. Given the length of time that the parties had chosen to live apart and the lack of funds he was entitled to find that there was no breach of article 8. I am not persuaded that there were any compelling circumstances or that he was wrong to find that that was the case but the lack of required maintenance is fundamental. Article 8 is not a standalone alternative to the Immigration Rules. It is certainly not a bypass and it is to be assessed where relevant against the background of the rules.

10. I note here that there is a clear difference between being in a situation not contemplated by the Immigration Rules and simply failing to meet them. It is the case here that the Appellants fail to meet them. There being no near miss principle applicable, there is nothing remotely compelling about the circumstances when as I have noted they have chosen to live apart now for the best part of fourteen years with a two week exception two years ago.

11. I note that at the start of the hearing Mr Adophy informed me that there was now evidence of the registration of their marriage. So far as this hearing is concerned that is not legally relevant as it does not go to show that the Judge erred in any way. The decision that he made was on the evidence presented to him which, it is accepted, did not include evidence to show that there was a legal marriage.

12. The evidence referred to by Mr Balroop can form the basis for a renewed application along with any other evidence to show that the marriage is genuine and subsisting and along with specified evidence which would show that the applicant meets the Immigration Rules in all other aspects.

NOTICE OF DECISION

In those circumstances I am satisfied that there was no error and if anything the grant of permission to the Upper Tribunal was generous. For the reasons given the appeals are dismissed and the decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

Signed Date 5th August 2015

Deputy Upper Tribunal Judge Parkes

To The Respondent

Fee Award

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 5th August 2015

Deputy Upper Tribunal Judge Parkes