Upper Tribunal

(Immigration and Asylum Chamber) Appeal Number: EA/06790/2016

and EA/00172/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th October 2018	On 20th November 2018

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

[A Z] and [R Z]

(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal.

2. The appellants are father and daughter. The father and first appellant, AZ is a Pakistan national born on 4th January 1986. The Secretary of State was granted permission to appeal against a decision of First-tier Tribunal Judge Ripley promulgated on 18th May 2018 allowing the appeal against the decision of the Secretary of State dated 27th May 2016 which revoked the first appellant's residence card on the basis of a marriage of convenience to TZ, a Czech national born on 4th February 1964.

3. The second appellant, RZ, the daughter, (whose mother is a Taiwanese national, MAW, born on 26th August 1976), was refused a residence card by the Secretary of State on 29th November 2016. Both decisions were refused under Regulation 2 of the Immigration (European Economic Area) Regulations 2016. The Secretary of State decided that as the father and first appellant was not a family member of an EEA national nor was the second appellant.

4. The background is as follows. The first appellant AZ claims to live with both his EU national, sponsor and wife, and also, secondly, with Ms MAW, (his daughter's mother) in an intimate relationship. AZ, the first appellant made contact with MAW in 2009, married the EU sponsor in October 2010, visited the UK twice in 2012 and 2014 and was issued with a Czech residence card on 23rd June 2014 because of his relationship with his EU sponsor. The first appellant AZ entered the UK in 2014 to live. In 2015 MAW became pregnant and on 6th February 2016 the second appellant, RZ, was born. She has a Pakistan passport. It is said that the first appellant, the EU sponsor, TZ, MAW, and the second appellant RZ, all live together in a polygamous relationship.

5. MAW applied for leave to remain on family and private life grounds and that application was refused on 14th June 2016. Her appeal was refused, at the same time as this appeal was considered, by First-tier Tribunal Judge Ripley on 23rd April 2018 on family and private life grounds. Permission to appeal was granted but no error of law was found in the decision. That Error of Law Decision is attached as an appendix to this decision.

Application for Permission to Appeal

6. The application for permission to appeal made by the Secretary of State contended

(i) the claim of the first and second appellants to be father and child was not accepted and the judge failed to give adequate reasons for accepting this. There was no DNA evidence.

(ii) in assessing the claim the judge did not indicate what, if any, were the relevant findings from the appeal of the second appellant's mother (HU/16859/2016). The judge evinced dissatisfaction from that decision

about the evidence given but the findings were not set out nor did the judge identify the impact of those findings **AA (Somalia)** [2007] EWCA Civ 1040. The judge did not engage with the nature of the relationships nor the role played by the first appellant or the concerns regarding the relationships.

(iii) when concluding that the marriage was not one of convenience the judge failed to recognise that the appellant had known the mother of the second appellant *prior* to his marriage. This was referenced in the decision HU/16859/2016). The judge failed to take into account a relevant factor.

(iv) the judge, when factoring in that the first appellant was issued with a Czech residence card failed to take into account that the first appellant's relationship with the second appellant's mother MAW, was not brought to the attention of the Czech authorities. The judge therefore gave undue weight to the residence card issuance.

7. Permission to appeal was granted by Judge Buchannan. The grant stated that *'I do not wish to limit the scope of matters which might be advanced in support thereof'*. For clarity I confirmed that permission was granted on all grounds advanced by the Secretary of State.

The Hearing

8. At the hearing, Mr Melvin submitted that he relied on the grounds of appeal. He referred to the judge's findings at [38] and [39] of the decision in (HU/16859/2016) (MAW's appeal) that the evidence between the witnesses, particularly that of the first appellant and the EU national was discrepant.

9. Mr AZ attended the hearing and stated that he had since the decision submitted DNA evidence. This was not, however, before the First-tier Tribunal and nor had it been submitted in accordance with Rule 15(2) of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Conclusions

10. In the separate appeal of MAW, (HU/16859/2016), the judge clearly found the evidence of the first appellant and the witnesses discrepant. The judge found that the appellant's EU wife and MAW shared accommodation and that they all shared intimate sexual relationships. The judge however found that the first appellant and MAW were partners. Neither had any vulnerability or dependency and the judge found that it was open to the first appellant to remove with MAW should he wish. This would not interfere with the EU sponsor's freedom of movement rights. The partner and the daughter were not Taiwanese, but the appellant had not shown that they could not successfully apply for visa. In the alternative, MAW had not shown she could not obtain a visa for Pakistan and relocate there with her partner and their daughter. Overall the decision on removal was proportionate.

11. There was no DNA evidence before the First-tier Tribunal to show that the child (the second appellant) was the child of the first appellant. As such the child was not classified as a step child and family member of the sponsor.

12. In this appeal, the oral evidence given before the First-tier Tribunal was set out in the decision of Judge Ripley between paragraphs 6 and 16.

13. The judge stated that the respondent had found the marriage to be one of convenience because he had a daughter outside of wedlock. The judge noted that the child was born five years after he was married in 2010 but, as pointed out in the application for permission to appeal, the evidence of the first appellant, the sponsor and MAW was found to be inconsistent and, further, the first appellant and MAW had formed a relationship *prior* to the marriage. That they had not met in person prior to 2015 [23] does not engage with the fact that the first appellant was forming a relationship with another person, with whom he proceeded to have a child, when entering into marriage with the EU national sponsor. The judge noted the age difference between the first appellant and the EU national sponsor, the sponsor was 20 years older than AZ, but did not engage with the fact that the Czech authorities were seemingly unaware of another relationship when issuing a residence card. The judge found the move to the Czech Republic was indicative of commitment to the EU national but engaged no further with the fact that the relationship with another woman had been embarked upon or that the evidence was inconsistent. Specifically, at [26] the judge found

> *'the witnesses have given inconsistent evidence regarding the development of the first appellant's relationship with the second appellant's mother and this undermined their credibility. There were also a number of other discrepancies in the evidence which are set out in the linked appeal'[(HU/16859/2016)].*

14. The judge proceeded

> *'This and the first appellant's ongoing relationship with the second appellant's mother, leads me to have doubts that the first appellant currently enjoys a genuine matrimonial relationship with the sponsor as asserted. However, this relates to a period five years after their marriage and I am not satisfied that those concerns should undermine the genuineness of their relationship at its outset in 2010 and the years that followed'*.

15. The judge did not identify those discrepancies which were relevant to the onset of the relationship with MAW (the second appellant's mother).

16. The judge had found that it was not possible to ascertain from the photographs whether their claim was correct that they were taken from each year between 2010 and 2018. Further the judge did not engage with the impact of finding that the evidence was not credible with regards their later relationship, on the formation of or the earlier part of the relationship

and intentions thereto. The judge referred to the Commission's guidance, but he had not determined that the couple were in a 'relationship for a long time' before marriage, or 'had a common domicile/household for a long time' (that was not specifically found on the evidence- merely that there had been movement to and from the Czech Republic). Nor did the judge heed the guidance indicators that abuse is more likely to include where the 'couple are inconsistent about their respective personal details' which she had found. Moreover, as the grounds of application for appeal pointed out, the list was not exhaustive. The judge also took into account that they had not divorced. That is not necessarily an indicator that the marriage was not one of convenience at the outset.

17. **Sadovska and another (Appellants) *v* Secretary of State for the Home Department (Respondent) (Scotland)** [2017] UKSC 54 set out as follows

> *28. … 'as held in Papajorgji, that the tribunal has to form its own view of the facts from the evidence presented. The respondent is seeking to take away established rights. One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.*
>
> *29. For this purpose, "marriage of convenience" is a term of art. Although it is defined in the Directive and the 2009 Communication as a marriage the sole purpose of which is to gain rights of entry to and residence in the European Union, the 2014 Handbook suggests a more flexible approach, in which this must be the predominant purpose. It is not enough that the marriage may bring incidental immigration and other benefits if this is not its predominant purpose. Furthermore, except in cases of deceit by the non-EU national, this must be the purpose of them both. Clearly, a non-EU national may be guilty of abuse when the EU national is not, because she believes that it is a genuine relationship.*
>
> *30. In the case of a person exercising EU law rights, the tribunal must also be satisfied that the removal would be a proportionate response to the abuse of rights established. So it would be one thing to find that the proposed marriage had been shown to be one of convenience, and therefore that it was right to prevent it, but quite another thing to find that expelling Ms Sadovska from the country where she had lived and worked for so long and had other family members living was a proportionate response to that'.*

18. Without more the judge proceeded to find at [30] that the marriage was not entered into solely or predominantly for immigration reasons. Although it is understandable that the legal and factual cases of the first and second appellant and MAW were considered separately they are nevertheless interlinked. When arriving at the conclusion that the Secretary of State had not shown that the marriage is one of convenience, *all* relevant

factors needed to be taken into consideration. The judge was mindful that it was for the Secretary of State to prove that but the judge must address all relevant factors.

19. The decision in relation to the first appellant is critical for any findings with relation to RZ, the second appellant. The approach to the findings in the decision HU/16859/2016 was relevant but not adequately addressed for the reasons given above and is an error of law.

20. The Judge erred materially for the reasons identified. I set aside both decisions pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington Date 13th November 2018

Upper Tribunal Judge Rimington