**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/16859/2016

**THE IMMIGRATION ACTS**

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

**Before**

**UPPER TRIBUNAL JUDGE RIMINGTON**

**Between**

**MS M A W**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: None
(Mr A Z who is an appellant in a linked case attended)
For the Respondent: Mr T Melvin, Home Office Presenting Officer

**DECISION AND REASONS**

**The Appellant**

1. The appellant appeals against a decision of First-tier Tribunal Judge Ripley promulgated on 23rd April 2018 dismissing her appeal against the respondent's decision dated 14th June 2016 to refuse her application for leave to remain pursuant to Appendix FM, paragraph 276ADE and on Article 8 grounds.

2. The appeal as set out by Judge Ripley was linked to the appeals of the appellant's daughter (appeal reference EA/00172/2017) and the father of her daughter AZ (appeal reference EA/06790/2016).

3. Mr Z is married to a Czech national TZ. Judge Ripley considered Mr Z's appeal at the same time as hearing the appellant's appeal in this matter.

4. It was asserted that the appellant had a relationship with Mr Z and they had produced a daughter. It was submitted that Mr Z, his wife (T, an EU national), the appellant and the daughter all lived in a polygamous relationship together.

5. The appellant is a Taiwanese national born on 26th August 1976. She states she first visited the United Kingdom in 2014 and stayed with Mr Z. She returned for a second visit in 2015 and fell pregnant. She travelled with Mr Z to Belgium, was refused re-entry to the United Kingdom and detained. She was released but has no lawful status in the United Kingdom. The child was born on 6th February 2016. The appellant claimed that she and her dependent child were unable to leave the United Kingdom and return to Taiwan as they feared for their safety there, because she was married, and her husband still resided in Taiwan and she had chosen to have a child with another man. As a result, her husband would attempt to harm her should she return.

6. That application was refused by the Secretary of State on the basis that Mr Z was neither her spouse nor her fiancé and she could not meet the Rules under Appendix FM. The Secretary of State did not accept that her relationship with her partner was genuine and subsisting or that she had been living with him in a relationship akin to marriage because the claimed partner was married and still in a relationship with his spouse. In fact, the Secretary of State also asserted that the partner's relationship was rejected as a marriage of convenience.

7. Her application was also considered on the basis of her parental relationship with her child who was in fact a national of Taiwan and/or Pakistan. It was noted that the dependent child had leave to remain in the United Kingdom, but the appellant claimed to live with her dependent child, her claimed partner the child's father and the partner spouse. She did not have sole parental responsibility for the child and was unable to meet the eligibility requirements of E-LTRPT.2.3(a) of Appendix FM.

8. Her private life was considered but rejected under paragraph 276ADE and on the basis of exceptional circumstances. The Secretary of State found it was open to the appellant to remove with the child and the impact of removing the child would be nominal at best. There was nothing to preventing the child's father the claimed partner from joining her and her child in Taiwan where there was an education system. There were no exceptional or compelling circumstances.

9. It is important to state that there was no DNA evidence before the First-tier Tribunal of the relationship between the child and the father.

10. The judge made the following findings:

    (i) The judge accepted that the appellant and Mr Z had a child together and although there was no DNA evidence, there was no challenge made in the reasons for refusal letter to the claimed parentage.

    (ii) The judge accepted that the appellant and her partner Mr Z were a couple. The judge accepted the evidence to show that the appellant currently lived with the father and her child and that she continued to have a sexual relationship with him.

11. The judge stated with reference to that relationship at paragraph 28:

> *"I am satisfied that was purposefully omitted in the evidence beforehand in the hearing and in the extensive letters and statements written before the appeal because the appellant's partner was concerned that this may undermine his argument that his marriage was not one of convenience. This was the subject of his linked appeal."*
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> '*There is family life between the appellant, her partner and their child. If the appellant was to be removed from the UK and her partner and child remained as is their EEA right, then this would constitute an interference to their family life. I must find that refusal of this appeal would have consequences of such gravity to engage Article 8' [29].*

12. The judge noted that the respondent had disputed that the appellant's relationship with her partner and her daughter or her private life entitled her to leave within the Rules and he found

- Under the Immigration Rules the appellant's partner was not British or settled contrary to paragraph E-LTRP.1.2 and

> '*Her daughter is neither British and nor her (sic) she lived here for seven years and thus the appellant cannot qualify under the parent route of Appendix FM' [30].*

- In relation to a protection claim or claim for asylum on reliance on fear of return to Taiwan because of the adultery laws, this was a new matter which had not been consented to by the respondent [31].
- The appellant had claimed that she had no ties in Taiwan but had not provided evidence to explain why this was or why she was unable to develop relationships during the years that she lived in Taiwan, she did not suffer from poor health and although she stated she did not speak Chinese fluently and would find it difficult to work, the appellant's partner could either go with her or alternatively he could support her and his daughter's childcare costs from employment in the UK. She could use her skills to assist her to secure employment in Taiwan [32].

- It was not accepted that the appellant's status as a single mother or as a mother of a child born out of wedlock these would cause her significant difficulty. The judge did not find overall the difficulties she would face would be obstacles to integration on the grounds of her gender [33].
- The judge recorded the primary issue on compelling circumstances were that the daughter and appellant's partner had EEA rights. The judge accepted that the appellant's partner was not a party to a marriage of convenience and thus he and his daughter fell within the definition of family members of an EEA national [34].
- When considering whether there was family life between the appellant's partner and his wife the judge noted at [38] that the appellant's partner's evidence and that of his wife's was discrepant. Reasons were given at paragraph 38 and paragraph 39. The judge found the inconsistencies significantly undermined the reliability of the evidence. The judge did not accept that Mrs TZ would wish to continue to live with her husband in the circumstances where both were having sexual relationships with him. She was not dependent on him. The judge did not accept at [40] that the appellant's partner Mr Z was continuing to enjoy such a relationship with his wife.
- At paragraph 42 the judge accepted that the appellant's partner and his wife continued to share the same home.
- In relation to proportionality the judge noted that case law suggested that family life relying on Article 8 should only be respected in monogamous relationships although he was alive to the issue of whether the interference was proportionate nonetheless.
- The judge factored in Section 117 and that she could speak English and earn sufficient funds, was a neutral factor in accordance with **Rhuppiah v The Secretary of State for the Home Department [2016] EWCA Civ 803**. The judge found it would not be disproportionate for the appellant's partner to choose whether he wishes to remain with his wife or live with the appellant. This was not a compelling ground to support her claim outside the Rules.
- The EEA Regulations did not provide for more than one partner at a time. Requiring the appellant's partner to leave if he wished to maintain his family life with another woman would not interfere with Mrs TZ's EEA rights or indeed the appellant's.
- The judge considered Section 55 of the Borders, Citizenship and Immigration Act 2009 in respect of the child's best interests. The child referred to Mrs TZ as auntie. The child was over 2 years old and if separated from Mrs TZ she would miss her initially but her primary relationships were with her parents. She was too young to have an established private life outside the family [47].

- The appellant's partner had lived in the UK for four years and the appellant for only two years. They had provided no evidence of an established private life beyond her partner's employment. The appellant's partner's residence was lawful but the judge was not satisfied that requiring them to leave the UK would be a disproportionate breach. The appellant's partner had not acquired independent residence rights but had been dependent on his wife's EEA right.
- It was acknowledged that the appellant's partner and her daughter were not Taiwanese nationals but they could apply for visas.

**Application for Permission to Appeal**

13. It was advanced that it was not shown that they could not successfully apply for Taiwanese visas because that had not been raised. Secondly the appellant could not apply for residence in Pakistan without an original passport that detail went completely unacknowledged. Then similarly the appellant's partner and daughter cannot apply for Taiwanese residencies without the appellant's passport or the original Taiwanese ID card.

14. Secondly the judge agreed at paragraph 34 that the appellant's partner and his daughter fell within the definition of EEA family members and had a right to reside in the UK on this basis and the appellant's child would have to lose one of the parents because one child could not successfully apply for residence in the country of each other's origin. It would not be proportionate to uphold removal of the spouse if there was a close and genuine bond with the other spouse or the effect is that to sever a genuine and subsisting relationship between parent and child. The best interests of the child were an integral part of the proportionality assessment and the best interests of the child must be a primary consideration. The judge had not emphasised enough the best interests of the child. Further, the EU Directive accepted that step-children were a part of the EEA family member but clearly recognised the need of establishing a bond between step "kids" (sic) and step-parents. It should have been decided what was reasonable in the circumstances. There was a breach of the subsisting parental relationship between the appellant and her child who would lose one of the parents in the case of removal of the appellant which was a breach of the EU charter of fundamental rights.

15. Permission to appeal was granted on the basis that "the wrong legal test had been applied in the Article 8 claim". The decision was whether it was proportionate.

16. At the hearing Mr Melvin submitted that the judge had set out the evidence at paragraphs 38 and 39. There were significant discrepancies in the evidence.

**The Hearing**

17. At the hearing the appellant did not attend and I am satisfied that she was given the date, time and venue of the hearing. There was no written authority by Ms Wang for Mr Z to act on her behalf or give evidence in relation to her case albeit that he was insistent that she was unable to attend because of the childcare. I considered the written grounds for permission to appeal.

**Conclusions**

18. The appellant did not attend her own hearing. She had been advised of the date time and venue. There was no indication that she had attempted to secure any form of legal representation and in the absence of written authorisation it is not clear that Mr Z had authority to make submissions on her behalf. There was no application for an adjournment, written or otherwise, and in the circumstances, I consider that it was fair to proceed with the hearing of which the appellant had ample notice.

19. I am not persuaded that the decision in any way transgressed the rights of the appellant or failed to consider the best interests of the child. The appellant had been in the UK for only two years, illegally, and she could not fulfil the Immigration Rules. It was claimed she lived in a polygamous relationship. As the judge found there was no requirement that the child leaves the jurisdiction (if she is an EU national) and it was a matter for the appellant and her said partner as to whether they wished to be together in either Taiwan or Pakistan. This was not an application on the basis of the EU Regulations.

20. The judge carefully considered the child's rights throughout the decision and specifically at [47]. I refer to the findings outlined above. On the conclusions of the judge it is clear that the appellant was not the only primary carer of the child and I repeat the judge found there was no requirement to remove the child from the EU. That as the judge found was a matter for the parents to decide. The judge was entitled to make that finding. The judge specifically referred to and directed himself in line with **ZH (Tanzania)** [2011] UKSC 4 and **Azimi-Moyayed (decisions affecting children)** UKUT 00197.

21. It is not sustainable to maintain that the judge failed to direct himself legally appropriately with reference to the balancing exercise and assessment on proportionality. Paragraph [43] is given the heading of 'proportionality' and the judge clearly had the relevant test in mind. The judge considered the relevant factors throughout and, in the round, and at [45] found there were no vulnerabilities on the part of the appellant, her partner, or his claimed EU national wife. The judge considered the wider rights of those involved but found overall the decision to remove the appellant, having considered the best interests of the child, and having applied Section 117 of the Nationality, Immigration and Asylum Act 2002 the appellant not to be disproportionate.

22. There was no evidence in relation to visas before the judge and no reason to suppose that one or other could not apply for visas to join the other on their country of origin that is either Taiwan or Pakistan. The judge cannot be criticised for considering material not before him. As the judge found at [49] there was no evidence that the appellant and the child could not apply for visas in Pakistan.

23. It is not clear on a careful reading of the decision, bearing in mind the discrepancies found in the evidence that the judge erred. He applied the correct test in relation to proportionality and addressed the best interests of the child.

> **Shizad (sufficiency of reasons: set aside)** [2013] UKUT 00085 (IAC)
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> *'Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge'.*

24. I therefore find no error of law in the decision of Judge Ripley and the decision will stand.

**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 their 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. This decision refers to a minor hence this order.

Signed *Helen Rimington* Date 13th November 2018

Upper Tribunal Judge Rimington