Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/07594/2015
OA/07596/2015
OA/07597/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th January 2018	**On 5th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

DEVASHWARI [D]
[Y]
[S]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Hussain
For the Respondent: Mr Kotas

DECISION AND REASONS

Introduction

1. The Appellants born on [ ] 1981, [ ] 2002 and [ ] 2005 are all citizens of India. The first Appellant is the mother of the second and third Appellants. They have made application for entry clearance to the United Kingdom to join the first Appellant's spouse as a dependant. The Entry Clearance

Officer had refused that application on 13th March 2015. The Appellants had appealed that decision and the appeal had been heard before First-tier Tribunal Judge Beg at Taylor House on 18th January 2017. The judge had dismissed the appeals.

2. Permission to appeal had been made to the First-tier Tribunal and that permission had been refused by Upper Tribunal Judge Martin on 1st September 2017. A further application for permission to appeal was made to the Upper Tribunal and that application was granted by Upper Tribunal Judge Pitt on 19th October 2017. It was said that it was arguable that there had been an error as to the admission of post-decision evidence an incorrect standard of proof being applied and that evidence potentially to show the marriage was genuine and the Sponsor was the father of the children was omitted from the assessment.

Submissions on Behalf of the Appellant

3. It was said that under Rule 15(2A) evidence was submitted which was in the form of DNA evidence to prove paternity and that the delay in getting that to the First-tier Tribunal was not the fault of the Appellants rather poor presentation by representatives. It was further submitted the judge had made an error by excluding post-decision evidence.

Submissions on Behalf of the Respondent

4. It was conceded the judge did not have much evidence to work on but nevertheless the exclusion of post-decision evidence was not a material error in this case.

5. At the conclusion I reserved my decision to consider the evidence and submissions raised. I now provide that decision with my reasons.

Decision and Reasons

6. The Entry Clearance Officer's refusal of this case had been on two distinct grounds namely:

   (a) It was not accepted that this was a genuine and subsisting marriage on the limited evidence produced.

   (b) The photograph taken of the family was considered a fake and accordingly a false document had been produced and refusal was also made under paragraph 320(7A) of the Immigration Rules.

7. The judge had noted at paragraph 5 that the Respondent no longer relied upon the second ground and indeed the issue of the photograph or any matters arising did not form any part of the judge's decision.

8. The judge at paragraph 7 had correctly stated the appropriate burden and standard of proof in this case. He had also noted "I take fully into consideration all the documents contained in the file". The decision

thereafter supports the fact the judge had carefully considered the documents available as well as the oral evidence produced.

9. It was clear from the outset of refusal that the paternity of the two dependent children was an issue in the case; given the genuineness of the marriage being called into question at the outset.

10. At paragraph 7 to 12 the judge had taken account of the limited evidence available and provided reasons for the findings made. There were concerns as to the validity of both the marriage certificate and the two birth certificates given that they had been obtained many years after the respective events. The supportive evidence from witnesses in India, in the form of documentary evidence was considered by the judge. In general little weight was attached to that evidence by the judge for reasons that he provided. There was a sufficiency of reasons given for that decision, nor could it be said that such a decision was one that no other judge would have reached. It did not transgress either the burden or standard of proof applicable in these cases.

11. The judge had further considered the bank account provided. It was said to be a joint bank account. However it was noted that whilst the Appellant's name was typed the Sponsor's name had been handwritten as an addition. The judge was entitled to question that oddity which is apparent when one examines the bank statements at pages 48 to 63 of the Appellants' bundle. He did note that the monies deposited into this bank account all post-dated the date of decision (13th March 2015) and were predominantly made in 2016. He did not take those deposits into account in line with the case of **DR (Morocco) [2005] UKIAT 0038**. That was an error, and indeed was identified as such by Upper Tribunal Judge Martin at paragraph 3 of her decision to refuse the application for appeal, on the basis that whilst an error it was not material to the judge's conclusion. It is clear that in terms of the bank statements the overriding concern was the addition in handwriting of the Sponsor's name turning a single owned account of the Appellant into ostensibly a joint account. That was not without significance given the core of the refusal was the genuineness of the marriage. The judge had further noted at paragraph 1 the features of the Respondent's refusal that noted there was no evidence of joint assets, liabilities or savings. Taken together that could raise a question when the name of the Sponsor was added to the account and did it only postdate the refusal letter, consistent with the entries of deposits noted by the judge. The judge in looking at those bank statements whilst noting the entries from late 2015 onwards, would have noted no earlier deposits, despite the parties asserting a marriage in 1999 and the Sponsor being in the UK for some years prior to 2015. Accordingly whilst it was an error not to consider that evidence of remittances in late 2015/2016 it was not a material error in the judge's assessment of the finances and that bank statement's peculiarities in particular.

12. Whilst it is said in submission the judge did not take account of a visit to India in 2016, potentially for the same reason, the only reference by the

judge to visits was to acknowledge in paragraph 13 the Sponsor made visits to India for almost seven years accordingly acknowledging that visits had been made.

13. The judge did not impose too high a standard when assessing evidence of the genuineness of the marriage but made reasonable findings based on the limited evidence available to him and applying the proper burden and standard of proof.

14. In terms of DNA evidence this is not without significance. There is now before the Tribunal by virtue of Rule 15(2A) DNA evidence and an explanation as to its failure to be before the First-tier Tribunal Judge. That explanation was essentially poor case presentation. It is further acknowledged that the Rule 15(2A) evidence only becomes relevant if admitted if the decision is remade following a finding that the judge made a material error of law.

15. The judge had commented upon the absence of DNA evidence at paragraph 12. It was noted that the explanation provided by the Sponsor for the absence of DNA evidence was the expense in providing such evidence. However the judge had noted that the Appellant had paid for legal representation and was in employment. The inference being that the explanation for no DNA evidence seemed to sit ill with the Appellant paying for and having legal advice and receiving a regular income. The judge further noted that had DNA evidence been available proving paternity that could not only prove the issue of paternity in respect of Appellants 2 and 3 but would have a bearing on the genuineness of the marriage, the core issue in this case. That was an understandable and accurate comment for the judge to have made. Indeed had there been DNA evidence available and not considered by the judge then that would almost self-evidently have been a material error of law. However the judge did not have that evidence, the DNA evidence only being made available in November 2017. Further the absence of that evidence given the juxtaposition of the Sponsor's claim of its expense but his payment for legal advisors and employment did not assist his case or his discharge of the burden of proof.

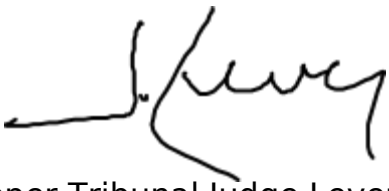
16. Accordingly whilst there is now DNA evidence available that was not before the First-tier Tribunal Judge and indeed there has been potentially contradictory reasons given for its absence. There had been no adjournment request to the First-tier Tribunal Judge to allow for the obtaining of DNA evidence. Accordingly on the evidence available before the judge whilst the judge did err in not taking account of payments post-March 2015 that was not a material error in this case. The judge applied the appropriate burden and standard of proof and had carefully considered all the evidence available. He reached a conclusion based upon reasoned findings that were open to him. There was not accordingly a material error of law made by the First-tier Tribunal Judge.

17. In terms of the way forward now there appears to be DNA evidence available it is of course open to the Appellants to make a fresh application placing that evidence together with a full and clear bundle of evidence before an Entry Clearance Officer.

Notice of Decision

There was no material error of law made by the judge in this case and accordingly I uphold the decision of the First-tier Tribunal.

No anonymity direction is made.

Signed  Date 3/4/18

Deputy Upper Tribunal Judge Lever

TO THE RESPONDENT
FEE AWARD

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

Signed  Date 3/4/18

Deputy Upper Tribunal Judge Lever