Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/00676/2018
EA/00677/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons**
Oral determination given following hearing	**Promulgated**
On 18 June 2019	**On 8 July 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

ENTRY CLEARANCE OFFICER

Appellant

and

DM
GV
(ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant (Secretary of State): Ms S Cunha, Senior Home Office Presenting Officer
For the Respondents (original appellants): No appearance and, on this occasion, no representation

DECISION AND REASONS

1. These appeals came before me substantively on 5 March 2019 when immediately following the hearing I gave an oral decision as to error of law

and also directions. I shall of necessity repeat some of what was contained within that decision below.

2. This is the Entry Clearance Officer's appeal against a decision of First-tier Tribunal Judge Paul, promulgated on 28 December 2018 following a hearing at Taylor House some fifteen days previously, on 13 December 2018. For ease of reference I shall refer to Ms DM and her son, Master GV, collectively as "the claimants" and to the Entry Clearance Officer, who was the original respondent, as "the Entry Clearance Officer".

3. I have made an anonymity direction because the second claimant is a minor.

4. The claimants are mother and son who were born respectively in April 1974 and October 2007. They had applied for EEA family permits to join the sponsor, who is the first claimant's husband, Mr V, the couple having been married on 6 September 2016. It was and remains claimed on behalf of the claimants that the second claimant is Mr V's son who had been born some nine years earlier. Mr V is a Portuguese national exercising treaty rights in the UK and the application was for family permits to enable them to join him pursuant to their rights under the EEA Regulations.

5. The application was refused, the Entry Clearance Officer having considered the 2006 EEA Regulations, which were then applicable, but having in mind in particular that there was no supporting evidence confirming the account given on behalf of the first claimant of matters which predated the marriage. Also, the marriage certificate itself had been dated some ten months after the claimed marriage and there was no supporting evidence corroborating the wedding. Although it was the claimants' case that the first claimant and Mr V had been in a relationship since about 2005, there was no evidence as to how that relationship had been continuing since that date. Although it was asserted that Mr V had been overseas since 2011 no evidence had been provided to show how contact or financial support was maintained during his absence, the birth certificate of the second claimant, said to have been born in 2007 with the first claimant and Mr V as his parents, was not issued until July 2017 (that is after the marriage relied upon) and was obviously not contemporaneous. In light of the weaknesses in the evidence and the complete absence of supporting evidence the Entry Clearance Officer somewhat unsurprisingly concluded that the relationship was not a genuine one but the marriage was in effect a sham marriage.

6. The claimants appealed against this decision and as has already been noted above, this appeal was heard before Judge Paul sitting at Taylor House on 13 December 2018 who allowed the appeal.

7. In my error of law decision I noted that the decision was extremely brief and I accepted the submissions made on behalf of the Entry Clearance Officer that the decision was not sustainable. I considered the reasoning inadequate to support the finding that the marriage was a genuine one

and I gave my reasons for so finding. It is not, for the reasons which appear below, necessary to set out these reasons again.

8. As I noted in my error of law decision the real issue in this case was whether or not, as the sponsor on behalf of the claimants claimed, the child was the child of both parents. The sponsor claimed that the second claimant was his biological child which was disputed by the Entry Clearance Officer, who did not accept that he had been involved in a genuine relationship with the first claimant since 2005 or that the second claimant who was born in 2007 was his son. I noted in my error of law decision that no DNA evidence had been produced which should be capable of establishing that the second claimant is indeed the son of the sponsor as the sponsor said he was. During this hearing the sponsor informed the Tribunal that he would be happy to obtain this evidence prior to the resumed hearing before me and I accordingly agreed a date for the resumed hearing with the parties which gave sufficient time for this evidence to be obtained. Ms Cunha who represented the respondent at this hearing as well as the hearing before me today did not seek to persuade the Tribunal that the objection could be maintained were the DNA evidence to be positive.

9. The hearing then came before this Tribunal again on 13 May 2019 having been listed in the Royal Courts of Justice but the sponsor attended on that occasion and informed the Tribunal that although he had provided the samples the results had not yet come through. Accordingly, with the agreement of the respondent, this hearing was again adjourned for a date to be fixed.

10. Subsequently, the sponsor has been given the results of the DNA test which are positive and show with a huge degree of likelihood, very close to 100%, that the second claimant is indeed his biological son as claimed. Accordingly, this appeal has now again been listed in front of this Tribunal. The sponsor did not attend this hearing but wrote to the Tribunal relying on the DNA evidence.

11. Ms Cunha appeared on behalf of the respondent and informed the Tribunal that having seen the DNA evidence, it was accepted on behalf of the respondent that the decision refusing the application was no longer sustainable as there was clear evidence that the sponsor was related to the child as claimed. Accordingly the respondent invited the Tribunal to again allow the claimants' appeal and I make the following decision:

Decision

12. **I set aside the decision of First-tier Tribunal Judge Paul, allowing the appeal, as containing a material error of law, but substitute a decision again allowing the appeal, on the basis of the evidence which has subsequently been provided.**

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.

Signed:

Upper Tribunal Judge Craig Date: 30 June 2019