



IAC-BFD- MD

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: OA/07620/2014

THE IMMIGRATION ACTS

**Heard at Bradford
On 31st July 2015**

**Decision & Reasons Promulgated
On 18th August 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

**MR BIRUK YTAYAL NEGATU
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Little, from Iris Law Firm (Middlesbrough)

For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant Biruk Ytaya Negatu is a national of Ethiopia, now resident in Uganda. He has been given permission to appeal against the decision of First-tier Tribunal Judge Hands, dismissing his appeal against the Respondent's refusal of 1st April 2014 to grant him entry clearance to the UK for family reunion.
2. The Appellant applied, in March 2013, for entry clearance to the UK to join Hiwot Gebru (the sponsor) who had been granted refugee status here on 31st May 2013. She is a national of Eritrea. After leaving Eritrea she

travelled to the United Kingdom via Yemen, Saudi Arabia (where she stayed for two years working illegally) and France.

3. The Appellant's application was refused on the grounds that he could not meet the requirements of paragraph 352A of the Immigration Rules (spouse/civil Partner of a refugee) and that there were no exceptional circumstances justifying a grant of leave outside the Rules.
4. In coming to her decision to refuse the application, the Respondent took into account the following facts and factors:
 - The Sponsor had claimed asylum on the basis of her fear to return to Eritrea on account of her Christianity.
 - It was accepted she had made mention in her asylum application of the Appellant whom she described as her husband.
 - She stated in her asylum application that she and the Appellant met in Saudi Arabia and that he is an Ethiopian national who was also living there illegally. He has now crossed into Uganda where he has claimed asylum.
 - Most particularly the Respondent was not satisfied that the Appellant could establish that he formed part of the Sponsor's pre-flight family. There was no evidence of a wedding having taken place in Saudi Arabia as claimed and no documentary evidence supporting this claim.
5. The Appellant's appeal came before FtT Judge Hands on 18th February 2015. In a decision promulgated on 3rd March 2015 the judge found (and made clear findings) that the Appellant could not meet the requirements of the Immigration Rules either under Rule 352A nor 352AA (person seeking leave to enter as the unmarried or same sex partner of a refugee).
6. She did accept however that there was a subsisting relationship between the Appellant and his Sponsor, which was evidenced by the Sponsor sending remittances to the Appellant in Uganda and by contact being maintained on Facebook. In addition there was evidence the Sponsor has undertaken a visit to Uganda to see the Appellant.
7. The Judge also noted at [3]. *"The Respondent was satisfied the decision he had made did not breach the Appellant's rights under Article 8 of the European Convention on Human Rights (ECHR). The details of the refusal are contained within the refusal notice dated 1st April 14 which was served on the Appellant"* After consideration of matters she dismissed the appeal under the Immigration Rules.
8. The grounds seeking permission focus entirely on the claimed failure of FtT Judge's to consider the Appellant's case outside the Rules, under Article 8 ECHR.
9. Permission was granted in the following terms:

"An arguable error of law has arisen in relation to the absence of consideration by the Judge of whether there would be a breach of Article 8. At paragraph 3 of the decision the Judge has referred to the Respondent

being satisfied that the decision made did not breach the Appellant's rights under Article 8 ECHR. At the conclusion of the decision the Judge has dismissed the appeal under the Immigration Rules and referred to no anonymity direction being made. No decision has been made as to whether there would be a breach of Article 8."

Thus the matter comes before me for hearing on whether the Judge's decision discloses an error of law such that the decision needs to be set aside and remade.

UT Hearing/Error of Law

10. Ms Little submitted that the Judge had not considered Article 8 ECHR. She made no challenge to the findings made by the Judge concerning the Immigration Rules. When asked to identify why she considered the Appellant's case to be one which would allow the Judge to stray outside the Immigration Rules, her submission amounted to this. There were compelling circumstances in this case, because family life cannot be enjoyed elsewhere else other than the UK. This is because of the Appellant's status as an asylum seeker in Uganda. There was an added reference to the Sponsor suffering medical problems, which included shortness of breath.
11. Mr Diwnycz responded robustly. He submitted that the FtT judge could not have done more than she did. She conducted an oral hearing and made clear findings. Those findings were that the Appellant had failed to provide satisfactory evidence that he lived with the Sponsor in Saudi Arabia; had failed to establish that he had been legally married to the Sponsor and importantly considering the above, had not shown that he and the Sponsor are excluded from enjoying family life together in Uganda. There was no evidence identified before the First-tier Tribunal Judge which could be said to amount to evidence of a compelling and exceptional nature not covered by the relevant Immigration Rules.
12. The only facts that the First-tier Tribunal Judge accepted amounted to this. The Sponsor had visited the Appellant in Uganda and sent remittances. There was evidence that they enjoyed family life there.
13. Against that she had travelled there only after she was granted refugee status. Whilst the Judge was satisfied that she did not doubt their intention to live together permanently should the appellant be granted entry, that did not amount to compelling and compassionate circumstances such as to bring a case outside the Immigration Rules.

Consideration and Findings

14. It is argued on behalf of the Appellant that his circumstances at the date of decision were sufficiently exceptional and compelling that it was open to the Tribunal to exercise discretion and consider (and allow) the appeal on Article 8 grounds. It is said that there was a failure on the part of the First-tier Tribunal by not so doing. I disagree with that.
15. The Judge was plainly aware, what was before her was an out of country entry clearance application. The relevant date in an entry clearance matter is the date of decision. That holds good for any out of country

human rights appeal. A good deal of the evidence put before the First-tier Tribunal post-dated the date of decision. Post decision evidence should only be considered if it sheds a light on the circumstances appertaining at the date of decision.

16. Returning to submission that Article 8 should have been considered, such a submission demonstrates an erroneous application of the case law relevant to Article 8 outside the Rules, since an appellant has to establish not simply that his circumstances were compelling or exceptional, but that there existed compelling circumstances which had not been covered by the Rules and which therefore existed above and beyond the Rules outweighing any public interest considerations. This has been clarified most recently in the case of the *Secretary of State for the Home Department v SS (Congo) and Others* [2015] EWCA Civ 385.
17. Even if I am wrong about that and the Judge was at fault because she made no decision as to whether there would be a breach of Article 8 it is hard to see how, in this particular case any such default would have been material. It is hard to see how, on the evidence which was before her, the Judge could have properly allowed the appeal under Article 8. Ms Little submitted that the Judge was under a duty to consider Article 8 because the original grounds of appeal mentioned it. However when one looks at the decision as a whole it is clear that Ms Little's submissions before the FtT focussed very much on the claim that the Appellant could meet the requirements of the Immigration Rules. The Judge has set out at some length Ms Little's submissions before her in [9] and [10]. Those submissions make no mention of Article 8.
18. With regard to the Appellant's particular case the question of the subsistence of the relationship was dealt with by the Judge who simply said that she was satisfied that the parties had formed an intention to live together and had a subsisting relationship. There was no finding that the parties are married or that she accepted the evidence of their claimed relationship in Saudi Arabia.
19. What she does seem to have accepted is that the sponsor was able to visit the Appellant in Uganda. She has already done so and no doubt continued their relationship there. The judge was told the parties keep in touch via facebook. So far as I can see there was no evidence to demonstrate any circumstances existing so as to justify a grant of leave outside the Rules. Article 8 cannot be used simply to circumvent the requirements of the Rules, nor can it be used as a country of choice for those intending to live together.
20. For those reasons I find that the decision of the First-tier Tribunal contains no error of law to merit the decision being set aside and remade.

Decision

21. This appeal is dismissed.

No anonymity direction is made

Signature

Dated

Judge of the Upper Tribunal

Fee Award

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

Signature

Dated

Judge of the Upper Tribunal