



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12923/2019**

THE IMMIGRATION ACTS

**Heard at : Manchester Civil Justice Centre Decision & Reasons Promulgated
On 19th November 2021 On 25th November 2021**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

**ROZINA ZEREZGI TEWELDE
(No Anonymity Order made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Greer, instructed by Ison Harrison Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside of the previous decision of the First-tier Tribunal by Upper Tribunal Judge Owens in a decision promulgated on 18 June 2021.

2. The appellant is a citizen of Eritrea, born on 7 September 1993. On 27 May 2019 she applied for entry clearance on human rights grounds, to join her husband in the UK as the spouse of a person with refugee status pursuant to paragraph 352A of the immigration rules. The sponsor is also a national of Eritrea, who arrived in the UK on 7 October 2015 and was recognised as a refugee on 27 October 2016. They claim to have met in Eritrea in 2009 and started a relationship. They planned to marry on 13 January 2013 in a traditional ceremony. However the sponsor was detained on 1 January 2013 and was unable to attend the wedding, which was then conducted in his absence with his brother acting as his proxy. The sponsor fled Eritrea after escaping from detention in June 2013. The appellant left Eritrea in January 2019 and travelled to Uganda, where she currently remains and from where she made her application.

3. The respondent refused the appellant's application under paragraph 352A(i), (ii) and (iii) of the immigration rules. No weight was accorded to the marriage certificate submitted with the application, given the appellant's failure to respond to an email request for an explanation as to how the marriage took place without the sponsor being present. The respondent did not accept that the appellant and sponsor were in a relationship akin to marriage, given the lack of any supporting evidence. The respondent considered, further, that the decision did not breach the appellant's Article 8 human rights.

4. The appellant appealed against that decision. Her appeal was heard by First-tier Tribunal Judge Raike on 17 March 2020. The sponsor gave oral evidence before the judge. The judge noted that the sponsor had been recognised as a refugee in the UK and had been issued with a permit on that basis until 26 October 2021. She noted that, following his detention, the sponsor claimed to have first re-established contact with the appellant in Sudan after he escaped and fled Eritrea, and that he had visited her in Kampala, Uganda in March 2019 shortly after she arrived there. The judge accepted that they had had such contact but did not accept that the appellant and sponsor were in a genuine relationship or that the marriage was a valid one. She did not find it credible, if the relationship was genuine, that the sponsor would have delayed to such an extent in making an application for the appellant to join him in the UK and found there to be a lack of consistency in the account of how and when they were in contact. The judge did not accept that the marriage was a valid one, based upon country information stating that marriage by proxy was not allowed in Eritrea. She concluded that the requirements of the relevant immigration rules were not met and that the decision was not in breach of Article 8 and she dismissed the appeal in a decision promulgated on 31 March 2020.

5. The appellant sought, and was granted, permission to appeal to the Upper Tribunal against Judge Raike's decision. The matter came before Upper Tribunal Judge Owens on 7 May 2021, to decide the error of law question.

6. In a decision promulgated on 18 June 2021 UTJ Owens found material errors of law in the judge's decision. With regard to the adverse findings about the genuineness of the marriage, Judge Owens found it astonishing that the sponsor would have given the details that he did about his marriage in his asylum interview three years prior to the appellant's application for entry clearance if the relationship was not genuine. On that basis alone Judge Owens set aside the decision, but she also did so on the basis that the First-tier Tribunal had made other flawed credibility findings. She found that even if the appellant could not meet the requirements of the immigration rules in relation to the validity of the marriage, there ought to have been an Article 8 assessment if Article 8 was found to have been engaged.

7. UTJ Owens set aside the decision in its entirety and directed that it be re-made at a resumed hearing in the Upper Tribunal on another date. Her full decision is annexed to this decision, as Annex A.

8. The matter then came before me. Mr Greer confirmed that the validity of the proxy marriage was still being argued, on the basis of the same evidence as before Judge Owens, namely a "Country Marriage Pack" from the Refugee Documentation Centre (Ireland). In response to my enquiry, Mr Tan confirmed that the sponsor had made an in-time application for indefinite leave to remain which was outstanding.

9. The sponsor gave oral evidence before me. He explained that the delay in making the entry clearance application was due to the fact that his wife could not apply whilst in Eritrea and she could not leave Eritrea earlier as it was so difficult to do so. He said that the marriage was valid and had been endorsed by the church. He had provided statements from three friends who had attended the marriage ceremony. His wife had limited stay in Uganda and had to keep renewing her permit. She was not safe where she was. When cross-examined, the sponsor said that his witnesses had not been able to come to the hearing but they were all present at the marriage ceremony. He had not been able to get a statement from his brother who acted as his proxy at the wedding as he was still in Eritrea and it was difficult to get evidence from there. The sponsor confirmed that his marriage was registered with the government of Eritrea. He confirmed that he was working part-time in the UK and was about to start full-time work.

10. Both parties then made submissions. Mr Tan relied on the absence of corroborating evidence in his submission that the marriage was not a valid one. He submitted further that the marriage did not conform to any of the three types referred to in the Refugee Documentation Centre country marriage pack and he asked me to place little weight on the marriage certificate. Mr Tan accepted that there was evidence of a genuine relationship but he did not accept that the evidence established any exceptionality outside the immigration rules and therefore submitted that the appellant could not succeed on an Article 8 claim. He said that she could make a further application to join the sponsor once he had indefinite leave to remain in the UK. In response to Mr Greer's reference to information on the Home Office website, Mr Tan accepted that applications could not be made from Eritrea.

11. Mr Greer submitted that the marriage certificate had a presumption of regularity and therefore ought to be accepted, as there was no evidence to the contrary. He submitted that the section in the Refugee Documentation Centre country marriage pack referring to the prohibition on proxy marriages related to civil marriages only. The appellant had therefore demonstrated that she was validly married. If not, a broad and sympathetic view should be applied for refugee families and the appellant should be considered as part of the sponsor's pre-flight family. The strict requirements of the immigration rules should be waived. It was not proportionate to continue to exclude the appellant. The only place they could enjoy family life was in the UK.

Consideration and findings

12. Mr Tan conceded that, in light of UTJ Owens' decision, the appellant's relationship with the sponsor was genuine and subsisting and that the only issue was the validity of the marriage.

13. In her decision of 18 June 2021, UTJ Owens found that the background material was opaque as to whether traditional marriages which were conducted by proxy were lawfully recognised. She considered Mr Greer's argument before her, that the evidence relied upon by the respondent to demonstrate the prohibition on proxy marriages in Eritrea related only to civil marriages and not to customary and religious marriages, but she concluded that that was not apparent from the documentary evidence and that the document could be read either way. The evidence before UTJ Owens was the Refugee Documentation Centre country marriage pack, which is the same evidence before me. I agree entirely with UTJ Owens that the documentary evidence is not clear and, in fact, could be read as stating that the prohibition on proxy marriages applied in all three types of marriage. Nothing further has been submitted despite the appellant having had ample opportunity to do so, either by way of further published materials or by way of an expert report. When that is considered together with the flaws identified by Mr Tan in the marriage certificate, namely the absence of any reference therein to a proxy being used, and the lack of weight that could be given to the identical, unsupported statements of three of the sponsor's friends, I cannot find that the appellant has produced evidence of a valid marriage. I am not able to stretch the evidence and speculate, as Mr Greer requested I do, that there was sufficient to show on balance that the appellant and sponsor were married. The evidence is simply not there and the appellant cannot demonstrate that she meets the requirements of paragraph 352A on the basis of a marriage to, or two year cohabitation with, the sponsor.

14. However, as UTJ Owens clearly indicated in her decision, the fact that the requirements of the immigration rules were not met is not dispositive of the appeal, given the finding that there was a genuine and subsisting relationship between the appellant and the sponsor. Clearly Article 8 is engaged on that basis and it is therefore necessary to consider the proportionality of the respondent's decision to refuse entry clearance. It was Mr Tan's submission that there were no exceptional circumstances justifying a grant of entry clearance outside the immigration rules in this case and that the appellant could make an application under Appendix FM once the sponsor was granted

indefinite leave to remain further to his application made several weeks ago. However I consider that there is a sufficient basis for concluding that the appellant's circumstances are exceptional, as UTJ Owens indicated in her decision.

15. It is accepted that the appellant and sponsor are in a genuine relationship and the circumstances of that relationship are not now challenged, particularly following the references by UTJ Owens at [17] to the sponsor's consistent evidence at his asylum interview. On the basis of that evidence, and UTJ Owens' findings, there is no reason to doubt that a marriage ceremony took place in 2013, albeit that it is not considered to be a valid one under Eritrean law in light of the sponsor's absence. The reason for the appellant's and sponsor's inability to live together as husband and wife since the marriage, owing to the sponsor's detention, has not been disputed, and indeed formed part of the sponsor's asylum claim which led to the grant of refugee status. I find no reason to doubt the sponsor's claim as to the precariousness of the appellant's situation in Uganda and the need continually to apply to renew her residency, which is consistent with the evidence of her status at pages 12 and 13 of the appeal bundle. That in itself provides some response to Mr Tan's suggestion that an application could be made at some point once the sponsor has indefinite leave to remain in the UK. It is also clear from the appellant's limited immigration status in Uganda that there is no basis for concluding that family life could be conducted in that country and, clearly, the grant of refugee status to the sponsor is sufficient to conclude that there could be no family life in Eritrea. Accordingly the only country in which family life could be conducted would be the UK.

16. It seems to me that, in such circumstances, there are compelling reasons why the application for entry clearance should be granted outside the immigration rules. The public interest factors in section 117B are not such as to outweigh the above considerations. I note the sponsor's evidence that he was working and was about to commence full-time employment, and in any event, with regard to section 117B(2) and (3), I do accept Mr Greer's submission that a broad and sympathetic view should be applied as in the case of refugee families to which no such requirements are applied.

17. For all of these reasons I consider that the respondent's decision is not a proportionate one and that it does amount to a breach of Article 8.

DECISION

18. The making of the decision of the First-tier Tribunal involved an error on a point of law and has been set aside. I re-make the decision by allowing the appeal.

Signed S Kebede

Upper Tribunal Judge Kebede

Dated: 22 November 2021

Annex A



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

Appeal Number: HU/12923/2019

THE IMMIGRATION ACTS

**Heard remotely at Field House
By UK Court Skype
On 7 May 2021**

Decision & Reasons Promulgated

.....

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**ROZINA ZEREZGI TEWELDE
(ANONYMITY ORDER NOT MADE)**

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Whitwell, Senior Presenting Officer

For the Respondent: Mr Greer, Counsel instructed by Ison Harrison Solicitors

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Raikes sent on 31 March 2020 dismissing her appeal against the refusal of a human rights claim dated 5 July 2019. Permission to appeal was granted on 6 May 2020 by First-tier Tribunal Judge Boyes.

Background

2. The appellant is a national of Eritrea. She applied to join her husband in the UK as the spouse of a person with refugee status pursuant to paragraph 352A of the immigration rules. The sponsor is also an Eritrean national. He arrived in the UK on 7 October 2015. He was recognised as a refugee on 27 October 2016. The couple claim to have met in Eritrea in 2009 and started a relationship. They planned to marry on 31 January 2013 in a traditional ceremony, however prior to the marriage on 1 January 2013, the sponsor, who was a teacher in Eritrea, was detained. He was unable to attend the marriage which instead was held with his brother as a proxy on 31 January 2013. The marriage is said to be a traditional marriage. The sponsor fled Eritrea after escaping from detention in June 2013. The appellant left Eritrea in January 2019 and travelled to Uganda.

The decision of the respondent

3. It is not accepted that the appellant meets paragraph 352A(i),(ii) and (iii) of the immigration rules. This is because the respondent noted that the wedding took place whilst the sponsor was in detention. An email was sent to the appellant asking for an explanation, but no response was received. Further it was not accepted that there was sufficient evidence to verify the relationship from 2009.

The hearing before the First-tier Tribunal

4. The sponsor gave oral evidence and both representatives made submissions.

The decision of the First-tier Tribunal

5. The judge found at [18] that she was not satisfied that the appellant and sponsor were in a genuine relationship prior to leaving Eritrea nor that the marriage they state was conducted there was valid.
6. The judge made negative credibility findings in respect of the sponsor. The judge gave weight to the fact that the sponsor failed to mention the marriage in his screening interview at the first opportunity and did not correct this error at the time of his substantive interview. The judge then accepted that the appellant did mention the marriage at the substantive interview which took place in June 2016 but gave weight to the delay between the sponsor obtaining refugee status and the appellant making the application to join the sponsor in the UK. The judge also relied on an inconsistency between the appellant and sponsor's evidence as to when they regained contact. The judge referred to the fact that the marriage certificate which was obtained in March 2019 did not refer to the

marriage being conducted by proxy. The judge found that the background material did not support the appellant's claim that proxy marriages were valid. The judge also pointed to a lack of supporting evidence.

7. The judge then turned to Article 8 ECHR, finding that the sponsor and appellant were not in a genuine relationship in Eritrea and did not marry there nor that they were in a genuine relationship prior to leaving Eritrea. The judge referred to the test in Kugathas v SSHD [2003] EWCA Civ 31. The judge finds that the appellant has failed to establish that he is in a relationship with the sponsor in the UK and that Article 8 ECHR is not engaged. The judge finds that the decision is proportionate in any event.

Grounds of appeal to the Upper Tribunal

Ground 1 -Making a perverse or irrational finding in respect of the screening interview

8. It was irrational for the judge to draw negative credibility inferences from the failure to mention his marriage at the screening interview when it is apparent from any rational reading of the screening interview that the sponsor was not asked about his family. It was perverse of the judge to make a negative credibility inference from the appellant's failure to correct this omission at the substantive interview when the judge conceded in the next paragraph that the appellant did mention the marriage in the substantive interview which took place in 2016.

Ground 2 - Procedural unfairness - the judge held matters against the appellant that were not put to the sponsor as a witness in the appeal hearing.

9. The judge made an adverse credibility finding in respect of the two-year delay between the sponsor being granted refugee status and the appellant's application to join him in the UK. This issue did not form part of the respondent's case and was not put to the sponsor in order for him to give an explanation in the hearing which could have included raising the funds for the application.

Ground 3 - The judge gave inadequate reasons for concluding that had the appellant been giving a truthful account of her circumstances she would have had further evidence at her disposal.

10. The judge made negative credibility findings because of a lack of corroborative evidence. The judge failed to identify what further potentially corroborative evidence she would have expected to be in existence which would have been readily available to the appellant or sponsor.

Ground 4 - Irrational/Perverse findings on proxy marriages in Eritrea

11. The judge misunderstood the difference between civil marriages and religious or customary marriages. The judge misunderstood that the prohibition on proxy marriages relates to civil marriages only.

Ground 5 – The judge reached perverse or irrational findings in respect of the consistency of the sponsor’s evidence.

12. The judge at [21] identifies an inconsistency between the evidence of the appellant and the sponsor. However, this alleged inconsistency is explained by the fact that the sponsor and appellant fled Eritrea at different times and there is no inconsistency. It is perverse or irrational to suggest that there is an inconsistency.

Grant of permission

13. Permission was granted by First-tier Tribunal Boyes on the basis that the appellant suggests that his opposing counsel acted dishonestly which is a serious issue. Permission was granted on this basis and all grounds were arguable.

Analysis and Discussion

Ground 1

14. The representative for the appellant confirms that there is no allegation that the respondent’s representative acted dishonestly.
15. The respondent asserts that Ground 1 is not made out because it was open on the evidence before the judge to give weight to the sponsor’s failure to mention his wife at the screening interview at the first opportunity and then to fail to correct this omission in his substantive interview. There is no error of fact because the judge acknowledged that the sponsor mentioned his wife in his substantive interview in 2016.
16. The judge accepted at [19] that the appellant mentioned the existence of his wife in his substantive interview which took place in June 2016. The judge notes the sponsor’s evidence that he was not asked about his wife in the screening interview but rejects this explanation as lacking in credibility because the sponsor was represented at the substantive interview and took no issue with any errors in the screening interview.
17. In my view it was irrational of the judge to make a negative inference on the failure of the sponsor to correct a mistake in the screening interview at the substantive interview when in the same substantive interview, in June 2016 he informed the respondent of his marriage which amounts to correcting the mistake. He gave details of his wife at question 14 and repeatedly referred to his wife and his wedding throughout the substantive interview at questions 27, 38, 39, 40, 119 and 122, 192, 193 and 194. He explained in detail that the wedding had already been planned prior to his arrest because he was intending to leave Eritrea to avoid military service and that he requested permission from the prison to attend the wedding which was refused. Importantly, these details were

given in June 2016, three years prior to the appellant applying for his wife to come to the UK when the appellant and sponsor gave a consistent version of events. It seems astonishing that the sponsor would give the correct name of his wife and an account of their relationship after fleeing Eritrea, 3 years before applying for the same wife with the same account of the marriage to come to the UK if the account was not genuine. I also note that the sponsor's account of his asylum claim as set out in the substantive interview was found to be genuine by the respondent because he was granted refugee status on the strength of the interview.

18. Additionally, on the face of the screening interview there was a blank box at the 'spouse question' (as well as elsewhere in the screening interview) which was at least consistent with the sponsor's evidence that he was not questioned about his wife at the screening interview. There was no evidence before the judge that the sponsor positively denied being married or asserted that he was single or had a different wife.
19. I am satisfied that in these circumstances that it was perverse of the judge to make a negative credibility finding on the basis of the failure to mention the marriage in the screening interview or to correct the omission because the omission was corrected in detail in the substantive interview and the appellant gave a plausible explanation as to why he did not mention his wife in the screening interview. I am satisfied that this error has infected the judge's view of the sponsor's and appellant's credibility and is sufficient on its own to set aside the decision.

Ground 2

20. It is asserted that it was procedurally unfair for the judge to make negative credibility findings in respect of the delay when this issue was not put to the appellant at the hearing for an explanation. It is said that this issue was not raised by the respondent in the decision letter, by the Presenting Officer at the appeal or by the judge. Fairness required this matter to be put to the sponsor for comment and the appellant was on that basis deprived of a fair hearing.
21. The respondent asserts that without access to the notes of hearing it is not possible to tell whether the matter was put to the appellant in this regard. The appellant is put to proof. There was some confusion as to whether the sponsor was or was not asked about the delay.
22. In any event, the respondent concedes in the rule 24 response that pursuant to MST v SSHD [2016] UKUT 443, it was incumbent on the judge to provide reasons why country conditions would not frustrate a family reunion application particularly as the appellant did not leave Eritrea until January 2019, two years after the sponsor's grant of refugee status and was not able to apply for family reunion within Eritrea.
23. I am in agreement with the respondent that there was an error in the judge's approach to the delay and I am satisfied that this further infected her view of the appellant's credibility.

Ground 3

24. The appellant argues that the judge draws a negative inference from the lack of corroborative evidence but fails to identify what evidence would have been available to the appellant or sponsor or take into account.
25. It is manifest from [24] that the judge is referring to the sponsor's failure to seek more evidence from his family in respect of his marriage and evidence to show that he requested permission to marry whilst in prison or that permission was refused. It is submitted that this ground does not disclose an error of law because the judge was properly entitled to take into account the absence of this evidence when deciding whether the marriage was lawful.
26. My view is that the judge at [24] manifestly relies on this lack of corroborative supporting evidence to find that the relationship between the appellant and sponsor did not exist prior to 2013 when the sponsor left Eritrea and goes to his credibility rather than the lawfulness of the marriage. It is not an error of law for the judge to require corroborative evidence which would reasonably be available to the appellant. It is questionable as to whether it is likely that the sponsor could obtain evidence from the prison from which he escaped. The judge notes that the sponsor has been able to send money to his family in Eritrea via friends. The judge finds his evidence that he did not ask his family to provide more evidence because he did not want them to get into trouble with the government as inconsistent with his claim to be in touch with his family and sending them money. It was not irrational for the judge to expect to see more evidence from the sponsor's family and I am not satisfied that this ground is made out.

Ground 5

27. It is said the judge relied erroneously on an inconsistency between the sponsor and appellant's evidence to make adverse credibility findings. The respondent's position is that reliance on the inconsistency was rational because there was an inconsistency in the evidence.
28. At [21] the judge states;
- "I further note that in her application for pre-flight family reunion, the appellant states when she was asked when and how they regained contact, that it was in Uganda in January 2019 and before that in Eritrea, yet again there is no explanation given he knew where she was in Eritrea, why she has stated that they regained contact in Uganda. I find that there is a lack of consistency in the account in respect of when, how and where they were exactly in contact with each other and indeed when the relationship commenced or indeed contact was regained".
29. The sponsor's evidence was that he last saw the appellant in Asmara in July 2012 before he went into hiding and they were due to marry on 13 January 2013. However, he was arrested on 1 January 2013 and so was not able to attend the wedding in person. He escaped from detention in June 2013 and fled to Sudan for a year before travelling to Libya for 1

month before travelling to Italy. His evidence was that he re-established contact with his wife when he reached Sudan at a time when she remained in Eritrea. In January 2019 the appellant travelled to Uganda and the sponsor visited her in Kampala, Uganda in March 2019.

30. The appellant's evidence was that after the marriage she lived with her husband's family. The sponsor states in response to a question on the application form asking her when she regained contact with the sponsor, "January 2019 in Uganda before then in Eritrea"
31. The appellant has manifestly stated in her application form that she had contact with the sponsor when she was in Eritrea and then when she was in Uganda, which is also the evidence of the sponsor. I do not agree with the respondent that there is any inconsistency in this evidence, and I am satisfied that the judge's reference to the inconsistency is flawed because it is based on a misunderstanding of the evidence and fed into her negative credibility assessment.
32. I find that Grounds 1, 2, and 5 are all made out in respect of the judge's negative credibility findings. The judge's approach to credibility is perverse, irrational and based on mistakes of fact.

Ground 4

33. The respondent served evidence in relation to the validity of Eritrean marriages on the day for the hearing. At [23] the judge finds that this evidence;
- "undermines the appellant's account because the information states that marriage by proxy or representation is not allowed, which casts doubt on the appellant and sponsor's claim that they were married whilst the sponsor was in prison. I further note that the information also states that a detained person cannot get married unless a Judge allows this and indeed when asked directly as to whether he was aware proxy marriages were allowed, the appellant clearly stated in his evidence today that he was aware they were not."
34. Mr Greer submits that the evidence produced by the respondent identifies a distinction between civil religious and traditional marriages and the judge failed to appreciate this. The appellant and sponsor entered in to a religious or customary marriage in the Eritrean Orthodox Church. The respondent's evidence demonstrates that religious or customary marriages are recognised under Eritrean law and the prohibition on proxy marriages without the consent of the attorney general's permission is specific to civil marriages. The notes does not indicate a prohibition on customary proxy marriages. Having read the document carefully, it seems that there is a difference between civil and customary marriages but it is not clear whether there is a prohibition on traditional marriages being carried out by proxy or whether this relates only to civil marriages. The document can be read either way. The guidance also states that no information could be obtained about proxy marriages. The appellant's evidence in his substantive interview was that

his marriage was a traditional marriage and he believed it to be valid. His evidence was that he asked the prison if he could attend his marriage. It is not clear whether the sponsor (not the appellant) was asked about civil marriages or traditional marriages in his oral evidence when he stated that proxy marriages are not permitted.

35. I find that in so far as the judge relies on the background material to make further negative credibility findings, the approach is flawed because the background material does not specifically run counter to the appellant's and sponsor's evidence.
36. Nevertheless, where I am in agreement with Mr Whitwell is that the burden of proof was on the appellant to demonstrate in the first instance that the family reunion rules were made out. The application was expressly refused under paragraph 352 (i), (ii) and (iii). The decision letter expressly raised the fact that the appellant was sent an email requesting more information about how the marriage took place without the sponsor present, and that there was no response. The respondent was entitled to rely on this lack of response to decide that the marriage was not lawful.
37. The lawfulness of the marriage was a central issue in the appeal and it was therefore incumbent on the appellant to demonstrate that the marriage was lawful in accordance with Eritrean law. The respondent relies on CS and Others (Proof of Foreign Law) India [2017] UKUT 000199 (IAC) and Hussein and Another (Status of passports; foreign law) [2020] UKUT 00250 (IAC) in this respect.
38. The appellant did not adduce any evidence in respect of the operation of Eritrean marriage law. The background material was opaque as to whether traditional marriages which are conducted by proxy are lawfully recognised and it is not possible in these circumstances for the appellant to argue that the judge's finding that any proxy marriage that took place was not valid was perverse. Ground 4 as far as it relates this aspect is not made out.

Materiality

39. Mr Whitwell's submission was that any errors in the judge's negative approach to credibility are not material in any event because the appellant did not provide sufficient evidence to demonstrate that the proxy marriage even if it had taken place was valid, it was never argued that the appellant and sponsor lived together for two years prior to the sponsor fleeing Eritrea and therefore the appellant could not meet the requirements of paragraph 352A in any event. The appeal was bound to fail on this basis because a failure to meet the rules is an important consideration in the proportionality assessment.
40. I am not persuaded by his submission. The decision was a refusal of a human rights claim and the grounds of appeal were that the decision

constituted a disproportionate breach of the right to respect for family life pursuant to Article 8 ECHR.

41. Where I do find that the errors in respect of negative credibility are material is in the assessment of Article 8 ECHR. Had the judge not relied on the contents of the screening interview, irrationally ignored the detail given in the substantive interview in relation to the marriage and relationship as well as the timing of that interview, had the judge not erred in attaching weight to the delay in applying for the visa and found inconsistencies where there were none, the judge may have formed a different view of the appellant and sponsor's credibility and may have found that the couple entered into a relationship as they claimed and held a proxy (albeit not valid) marriage in 2013.
42. These findings would have undoubtedly influenced the judge's assessment of whether Article 8 (1) ECHR was engaged and the proportionality of any denial of entry given the difficulties of family life taking place in Eritrea when the sponsor is a recognised refugee.
43. Although not pleaded in the grounds there is also a seeming failure by the judge to evaluate the evidence of the current relationship between the appellant and the sponsor. The appellant and sponsor have both provided evidence asserting that they have a genuine relationship and provided evidence of contact and money remittances from 2019 onwards as well as a marriage certificate and evidence of a visit to Kampala in 2019. The application was not refused under paragraph 352A(v) and by implication the respondent accepted that the appellant and sponsor intended to live with each other and that the relationship is genuine and subsisting.
44. The judge does not accept that the appellant and sponsor were in a relationship in Eritrea, nor that they entered into a proxy marriage in Eritrea, nor that the marriage was valid. It is manifest from the judge's findings that the judge rejects the appellant's and sponsor's evidence because he finds that their evidence is not credible.
45. There does not appear to be a distinct and separate finding as to whether there exists family life between the appellant and the respondent because they are currently in a genuine and subsisting relationship.
46. I infer from [39] that the judge does not accept that the appellant and sponsor are currently in a genuine and subsisting relationship because the judge states;

"I have found as stated above that the appellant has failed to demonstrate that he [sic] is in a relationship with the sponsor, who is now in the UK, and that prior to his arrival in the UK they had been living as a family unit. Taking into account the case of Beoku-Betts v SSHD 2008 UKHL 39 which makes it clear that interference with family remaining in the UK is a relevant factor, I do not find the consequences of such interference in these particular circumstances would engage the operation of Article 8 ECHR." (my emphasis)

47. Had the judge been satisfied that the appellant and sponsor were currently in a genuine and subsisting relationship, the judge no doubt would have found that Article 8 ECHR was engaged with respect to family life, particularly given that the family life is between partners and the low threshold of engagement which is referred to specifically by the judge at [38]. Implicit in the finding that Article 8(1) is not engaged is a finding that the appellant and sponsor are not in a genuine and subsisting relationship.
48. The grounds of appeal do not assert that the judge erred in her approach to Article 8 ECHR despite the judge's rather odd reference to Kugathas v SSHD [2003] EWCA Civ 31 at [37] which manifestly has no application to married couples or couples in a relationship. Since the grounds take no issue with this, I do not address it.
49. In summary, I am satisfied that there are various errors in the judge's approach to the appellant's and sponsor's credibility particularly in relation to the detailed account given by the sponsor in 2016 and the delay in making the application. The rational conclusion from the detailed account given by the sponsor in 2016, three years prior to the family reunion application is that this is weighty evidence that the sponsor was telling the truth about the relationship and to find otherwise is perverse.
50. I am satisfied that this error infected the Article 8 ECHR assessment. The fact that the appellant did not meet the immigration rules at 352A was not dispositive of the appeal. Had the judge found that Article 8 ECHR was engaged, the judge would have needed to go on to consider the proportionality of the decision which would have included consideration of the fact that the sponsor is a recognised genuine refugee who is not able to have family life with his Eritrean national partner in Eritrea. Had the judge found that Article 8 ECHR was engaged the judge may have come to a different conclusion.

Disposal

51. I am mindful of statement 7 of the Senior President's Practice Statements of 10 February 2010. Despite the fact that further factual findings are necessary, I am satisfied that this appeal should be remade in the Upper Tribunal.

Notice of Decision

52. The decision of the First-tier Tribunal involved the making of an error on a point of law.
53. I set aside the decision dismissing the appeal and all of the findings in their entirety.
54. I adjourn the appeal for re-making by the Upper Tribunal at a date to be notified.

Signed

Date: 15 June 2021

R J Owens
Upper Tribunal Judge Owens

Note and Directions

1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules, I have reached the provisional view that the forthcoming re-making hearing can and should be held remotely on the first available date after 15 July 2021.
2. I therefore make the following DIRECTIONS;
3. No later than 7 days after these directions are sent by the Upper Tribunal:
 - (i) the parties shall file and serve by email any objections to the re-making hearing being a remote hearing at all/by the proposed means; in either case giving reasons; and
 - (ii) without prejudice to the Tribunal's consideration of any such objections, the parties shall also file and serve:
 - (a) contact/join-in details, where the hearing is to take place remotely by the means currently proposed; and
 - (b) dates to avoid in July, August and September 2021
4. Both parties are to file with the Upper Tribunal and serve on each other skeleton arguments/ position statements with electronic caselists with links to the cases cited no later than 14 days prior to the date of the hearing.
5. If the appellant wishes to rely on any further evidence not before the First-tier Tribunal, the appropriate notices under rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 must be filed with the Tribunal and served on the other party within 28 days of the date of this notice.
6. The sponsor must also notify the Tribunal within 14 days of the date of this notice if she intends to give evidence from Uganda and provide join in details as well as indicate the best time of day ie 10 am or 2pm and whether she requires an interpreter.
7. The skeleton argument/position statements are to address in particular the validity of the proxy marriage and Article 8 ECHR.

8. The appellant shall be responsible for compiling and serving an agreed consolidated bundle of documents which both parties can rely on at the hearing. The bundle should be compiled and served in accordance with the Presidential Guidance Note [23- 26] at least 7 days before the hearing.
9. Additional documents and submissions must be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.
10. Service on the Secretary of State may be to [email] and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

Signed

Date: 15 June 2021

R J Owens
Upper Tribunal Judge Owens