



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

Appeal Number: OA/17479/2012

**THE IMMIGRATION ACTS**

**Heard at Glasgow  
on 18<sup>th</sup> June 2014**

**Determination  
promulgated  
on 20<sup>th</sup> June 2014**  
.....

**Before**

**UPPER TRIBUNAL JUDGE MACLEMAN**

**Between**

**ENTRY CLEARANCE OFFICER, NAIROBI**

Appellant

**and**

**YORDANOS TEKLE TESFAGABIR**

Respondent

For the Appellant: Mr A Mullen, Senior Presenting Officer

For the Respondent: Mr H V McCusker, of McAuley McCarthy & Co, Solicitors

No anonymity order requested or made

**DETERMINATION AND REASONS**

1. This determination refers to parties as they were in the First-tier Tribunal.
2. The ECO appeals against a determination by First-tier Tribunal Judge Debra Clapham, promulgated on 10<sup>th</sup> May 2013, allowing the Appellant's

appeal against refusal of her application for entry clearance as the spouse of a person with refugee status in the UK.

3. The ECO's refusal notice dated 31<sup>st</sup> August 2012 raised various issues, but the only one now remaining is whether the marriage between the Appellant and the Sponsor, contracted when she was aged 15, is a marriage legally recognised in Eritrea, and hence in the law of Scotland.

4. The Appellant's first Ground of Appeal to the Upper Tribunal was:

My marriage was properly carried out according to my church on 7<sup>th</sup> January 2008.

5. The First-tier Tribunal Judge said at paragraph 32 of her determination:

In relation to the ECO's contention that this was an illegal marriage since the Appellant was apparently under age, it appears to me that the background evidence shows that Eritrea as a majority population still follows Sharia law, as opposed to national law. Although the legal age for marriage is 18, under age marriage remains prevalent. I am satisfied ... that these parties entered into marriage ...

6. Mr Mullen at the hearing sought to raise a second Ground of Appeal, whether the judge applied the incorrect standard of proof. He said that the judge nowhere specifies the normal civil standard, and seemed to have fallen into the assumption that because the case involves a refugee, the lower standard of proof applies.

7. I decided at the hearing that it was much too late to raise an additional Ground of Appeal, and that in any event the point is of no substance. A judge is presumed to know the correct standard of proof, and the determination does not suggest that she decided the case on anything but the balance of probability.

8. I am satisfied that the judge erred in arriving at the conclusion that the evidence established a marriage of a nature which enabled the Appellant to succeed. Background evidence that the majority of the population follow Sharia law was irrelevant to the validity of a marriage in a Christian church. The question was not whether the Appellant and Sponsor entered into a marriage which followed custom and prevalent practice, but whether it was a marriage recognised as a matter of formal law. The judge reached no clear conclusion on whether she thought the marriage was customary, Sharia, or formally lawful. Such reasons as are expressed at paragraph 32 point to an outcome against the Appellant, not in her favour.

9. Mr Mullen initially submitted that any fresh decision should be reached by way of a remit to the First-tier Tribunal, but I could see no reason why the Upper Tribunal should not proceed to decide the case. Mr McCusker did not seek such a remit.

10. For the purposes of remaking the decision, Mr McCusker sought to rely on one further piece of background information which was not before the

First-tier Tribunal. Mr Mullen did not object to its introduction into evidence.

11. The Respondent's Country of Information Report (COIR) dated 13<sup>th</sup> October 2009 includes the following:

Marriage

- 22.06 The righttoeducation.org website contains a profile on Eritrea stating:

According to Article 46 of Proclamation No 1, 1991 of the TCCE, marriage is solely based on the voluntary agreement of both parties. In general, persons have to attain the age of 18 years if they are going to marry. In spite of this, the code in many Articles talks of underage marriage. But for an underage person to marry, he/she must voluntarily agree and get permission from his/her parents ... Although the draft civil code of Eritrea states that the marriageable age is 18, this does not apply if the man and woman have both attained the full age of 16 years and the woman submits to the authority who will celebrate the marriage a declaration made by a doctor stating that the woman is pregnant or has already given birth to a child ...

...

- 22.09 The World Organisation Against Torture (OMCT) has stated in its report published in 2003 ...

Eritrean civil law provides that the minimum age for marriage for both girls and boys is 18. Nevertheless, customary law carries great weight in Eritrean society and often girls are married at ages well below the legal limit. It is widely acknowledged in Eritrea that girls are married earlier than boys. The traditional view holds that the ideal age for marriage for a girl is between 12 and 18.

12. Paragraph 22.09 does not appear in later editions of the COIR. Mr McCusker submitted that the 2009 version was the most relevant, being nearest to the date of the marriage. He acknowledged that it does not show that the Appellant and Sponsor contracted a marriage formally recognised in Eritrean law.

13. Mr McCusker's next point of reference is a report which was in the Appellant's First-tier Tribunal inventory of productions at page 20, entitled "Gender Equality in Eritrea", from "wikigender.org". This relates that the Constitution and transitional civil code prohibiting discrimination against women have not yet been fully implemented. The following section appears on the next page:

Discriminatory family code

The transitional civil code recognises three types of marriage: civil, religious and customary. The code explicitly states that the minimum age of marriage for women and men is 18 years. These conditions do not apply to marriages governed by Islamic Sharia law. While the minimum age of marriage according to the civil code is 18 years of age, the civil code also recognises marriages between the age of 15 and 18 in recognition of Eritrean customary marriage practices ... For the most part customary marriage disregards the TCE's minimum age condition and sets its own minimums: the age for girls is 8 to 15 and that for boys is 12 to 15 ... marriages under customary law are still widely practised ... particularly in rural areas.

14. The further evidence relied upon in the Upper Tribunal is item 7, pages 10 to 26 of a supplementary inventory of productions, entitled "Eritrea Gender Profile November 2008". The authors are the Human Development Department of the African Development Bank and the African Development Fund. At page 26 of the bundle the following appears:

### 3.3 Legal Framework

3.3.1 Eritrea is a country of old customary laws and traditions many of which have been written several centuries ago, but amended in 1910. Customary laws still have a significant impact on the socio-cultural and socio-economic relations of Eritrean society and the fact that they are codified render them more difficult to change or supplant by modern civil codes. Although customary law is not recognised as an official source of law in Eritrea it enjoys a great deal of importance in practice. Because of lack of uniformity, as various Eritrean communities have their own customary laws, it makes blanket customary law application impossible. It has, however, maintained its importance in the Eritrean legal system through informal incorporation in "modern laws". For instance, while the age of majority according to the civil code is 18 years of age, the civil code also recognises marriages between the age of 15 and 18 in recognition of Eritrean customary marriage practices ...

15. Mr McCusker submitted that the above material is sufficient to show on the balance of probability that a church marriage contracted by a 15 year old Eritrean woman is among the types of customary marriage recognised as valid in Eritrean law. The only other information was in the statement of the Sponsor, who says that such a marriage is valid, but of course he is no legal expert. Mr McCusker submitted that it would be strange if the civil code were to recognise such a marriage if contracted in a mosque, but not if contracted in a church.
16. Mr Mullen in response directed my attention to the copy marriage certificate in the Respondent's First-tier Tribunal bundle at page 17. He observed that in its formal recording of the nationalities of the parties, their places of origin, the place of the marriage and the officiating priest, and endorsement with an administrative stamp, this seemed the type of document which might reflect a marriage contracted under a civil code or other formal legal requirement. On the other hand, he pointed out that it does not refer to any provision of any civil code or other legal source, which is commonly to be expected of such documents in any jurisdiction. He also submitted that it was surprising that the dates of birth or ages of the parties to the marriage were not recorded.
17. Mr McClusker acknowledged that the appraisal of the marriage certificate by Mr Mullen was a fair one, and had nothing to add.
18. I reserved my further decision.
19. There is before the tribunal no clear statement from a general background source of the relevant law of Eritrea, and no expert evidence on that law. The latter would be the ideal proof, but such evidence may well be difficult to obtain. The tribunal has to decide whether the Appellant has shown this to be more likely than not a valid marriage,

based on such evidence as there is. No material refers specifically to formal recognition of church marriages, nor to whether church marriages may be regarded as a type of customary marriage. One source quoted above suggests a distinction between religious and customary marriage. There may be infinite variety of customary practice, and the sources are clear that there are many different traditions in Eritrea. The sources suggest that Sharia may be one of the varieties of custom. Christian practice might, by analogy, be similarly accepted.

20. The background evidence contains some passages which tend to suggest that a marriage at the age of 15 would be accepted in custom but not in formal law, and others which tend to the contrary. It seems that a marriage in a mosque under Sharia law at such an age would be formally recognised. It also appears from the last passage referred to that such a marriage would be recognised under the civil code based on customary practices.
21. Either as a matter of recognition of a marriage contracted in a church in its own right, or as reflecting the acceptability of such a marriage in custom, I find it is more probable than not (if only just) that the marriage between the Appellant and Sponsor is a valid marriage in Eritrean law.
22. While it might well be that a Scottish court would refuse to recognise certain child marriages, there is freedom to marry at the age of 16 in Scotland. The Respondent has not suggested that even if regarded as a valid marriage in the law of Eritrea public policy would require recognition to be withheld by the law of Scotland.
23. The determination of the First-tier Tribunal is **set aside** and the following decision is substituted: the appeal, as originally brought to the First-tier Tribunal, is **allowed under the Immigration Rules**.



19 June 2014  
Judge of the Upper Tribunal