



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12439/2015

THE IMMIGRATION ACTS

Heard at Field House

Decision and Reasons Promulgated

On 10 May 2018

On 18 May 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

Y M (ERITREA)  
[ANONYMITY ORDER MADE]

Appellant

and

THE ENTRY CLEARANCE OFFICER  
PRETORIA, SOUTH AFRICA

Respondent

Representation:

For the appellant: Mr Charles Appiah, Counsel instructed by Duncan Lewis & Co solicitors

For the respondent: Mr Esen Tufan, a Senior Home Office Presenting Officer

DECISION AND REASONS

**Anonymity order**

*The Upper Tribunal has made an anonymity order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.*

## Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him a family reunion visa to come to the United Kingdom as the spouse of a refugee settled in the United Kingdom. The appellant is a citizen of Eritrea.

## Background

2. There is no dispute that the appellant is indeed an Eritrean citizen. The sponsor's evidence is that they met on Independence Day 23 May 2003 in Eritrea and that they were 'boyfriend and girlfriend' by October 2003.
3. The couple married in Eritrea in July 2004, while the appellant was performing his military service there. The last time the sponsor saw him before coming to the United Kingdom was in December 2006 in Eritrea, when he returned home on leave. He was next expected to return on 7 January 2007 for his Christmas leave, but did not come. Later, the sponsor found out that he had been imprisoned.
4. The sponsor gave conflicting evidence about whether she had tried to trace the appellant through his military unit, but she was clear that he did not let her know what had happened to him. She was baptised into the Pentecostal faith in September 2008, but in September 2008, the Eritrean authorities broke up a prayer meeting and arrested her and the other members of the group. She was in prison for a few months before escaping to Sudan in December. The sponsor's account has been accepted and on 6 May 2009, she was granted refugee status here. On 4 August 2014 she was given indefinite leave to remain.
5. The sponsor was worried. Evidence before the First-tier Tribunal from a friend of the sponsor was that the sponsor talked all the time about her concerns for her husband. She did not, however, keep in contact with his parents in Eritrea. She never commenced divorce or separation proceedings.
6. At an Eritrean festival in Leeds in 2013, 5 years after her husband's disappearance, the appellant met a man and had a one-night stand. They were both married, and the man had children already. She only ever knew the man's first name. The sponsor became pregnant and contacted the man to tell him: after many attempts to reach him, she finally got through, and spoke to him. He refused to take any responsibility for the baby, but she did give the child the man's first name as the baby's family name on the birth certificate. The appellant's daughter has refugee status in line with the sponsor.
7. The appellant's account is that he escaped from prison on 17 December 2014, over 6 years after his incarceration. The appellant entered Ethiopia six days later, where he stayed in a refugee camp. His evidence was that within days he had re-established contact with his wife, obtaining her telephone number in the United Kingdom from either her parents, or relatives of hers. In his wife's sponsorship letter of 30 August 2015, signed at the First-tier Tribunal hearing on 31 May 2017, she stated that 'I was able to contact him in the refugee camp in northern Ethiopia'.

8. In her sponsor letter, his wife said that she was 'very pleased to know that he is alive and delighted to hear his voice', that she loved her husband very much and wanted the marriage to continue. She had explained her situation and asked for 'his sensitive understanding and forgiveness', which had been given. Her husband was 'looking forward to be reunited with us'. In her witness statement for the Tribunal, she explained that her husband was 'very understanding and totally dedicated to our marriage' and that he had confirmed that he wanted to raise the baby as his own daughter.
9. An application for entry clearance for the appellant as the spouse of a refugee was made in August 2015, following a 6-month wait in the Ethiopian refugee camp for him to get his refugee status document. After the refusal of this application in 2015, the sponsor and her daughter visited the appellant for 2 weeks in November 2016. She has been sending him money to help support him in Ethiopia, and she produced telephone cards, copy (untranslated) emails and telephone records to show intervening devotion.

### **First-tier Tribunal decision**

10. The First-tier Tribunal heard the evidence of the sponsor and her friend in the United Kingdom. He placed no weight on the telephone cards as records of contact, nor on the 'flurry of contact since April 2015', although he did take account of the dates of the emails. The First-tier Tribunal Judge considered the contact to be designed 'to facilitate the appellant's entry clearance application as opposed to illustrating the subsistence of a genuine relationship between the sponsor and appellant'.
11. The First-tier Tribunal Judge made the following rather confused findings about whether at the date of application the marriage was subsisting:
 

"31. Whilst the evidence of contact between the sponsor and appellant that I have referred to points in the broadest sense to a subsisting marriage, the countervailing factors arising from the inconsistent and unreliable evidence and the sponsor's general lack of credibility suggests otherwise. ...

34. As I am satisfied that the sponsor and appellant do not intend to live together as man and wife and because I do not regard the marriage as subsisting, Article 8 does not require the appellant to be admitted to the United Kingdom."
12. The factors which weighed against the sponsor's credibility were her having a child by another man, her naming of her baby, her failure to keep in contact with the appellant's parents for many years, although she had their telephone number, and other minor discrepancies in her evidence and that of her friend who also gave evidence. None of these matters were put to the sponsor in evidence.
13. The First-tier Tribunal dismissed the appeal and made no anonymity direction. The appellant appealed to the Upper Tribunal.

## **Permission to appeal**

14. The grounds of appeal argued that the First-tier Tribunal had given unfair weight to immaterial matters; made mistakes when recording the evidence; exaggerated minor inconsistencies in the evidence of the sponsor and her friend; placed undue weight on the exchange of telephone numbers between the sponsor and the baby's father when she met him; mis-recorded her evidence to make it appear inconsistent, when in fact her evidence had been consistent and cogent throughout; and in particular, placed undue weight on the failure of the appellant to produce the NHS 'Red Book' about the child (which would not in any event, have mentioned the child's father).

## **Rule 24 Reply**

15. There was no Rule 24 Reply on behalf of the respondent.

16. That is the basis on which this appeal came before the Upper Tribunal.

## **Upper Tribunal hearing**

17. I heard submissions from Mr Appiah and Mr Tufan. I reserved my decision, which I now give.

18. I am satisfied that there is an error of law in the decision in that the Judge appears to have directed himself that this appeal sounded only in human rights under Article 8 ECHR, and not the family reunion provisions of the Immigration Rules HC 395 (as amended) at paragraph 352A. The appellant has a right of appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (as amended) because the refusal of entry clearance is an immigration decision under sub-paragraph 82(2)(b) of that Act.

19. Paragraph 352A of the Rules is as follows:

### **"Family Reunion Requirements for leave to enter or remain as the partner of a refugee**

352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee status are that:

(i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and

(ii) the marriage or civil partnership did not take place after the person granted refugee status left the country of their former habitual residence in order to seek asylum ...; and

(iii) the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and

(iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and

*(v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting. ..."* [Emphasis added]

There is no difficulty about sub-paragraphs 352A(i)-(iv) on the facts of this appeal.

20. The First-tier Tribunal's reasoning in relation to sub-paragraph 352A(v) is erroneous, since it conflates the intention of the sponsor during the years before she discovered that her husband had survived, with the intention of the parties at the date of application.
21. The First-tier Tribunal Judge discounted all positive evidence and relied on the existence of the child, and the sponsor's failure to contact the appellant's parents from 2007-2013, as dispositive evidence of her current intention, which analysis is unsustainable at the level of irrationality identified in the judgment of Lord Justice Brooke in *R (Iran) & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90].
22. The First-tier Tribunal Judge did not properly address himself to the evidence as at the date of application. I bear in mind that the sponsor has been found credible in relation to her own refugee claim and granted refugee status. I have regard to the starred decision of the Asylum and Immigration Tribunal in *STARRED GA ("Subsisting" marriage) Ghana* [2006] UKAIT 00046:

*"The requirement in para 281 that a marriage be "subsisting" is not limited to considering whether there has been a valid marriage which formally continues. The word requires an assessment of the current relationship between the parties and a decision as to whether in the broadest sense it comprises a marriage properly described as "subsisting"."*

23. It may be that up to 2013, this marriage could not have been so described. I make no finding thereon, because it is irrelevant to a proper consideration of the state of the marriage when the application for entry clearance was made in April 2013. The evidence of the sponsor was that she had confessed and been forgiven for her infidelity and that she was delighted to know that her husband was safe and wanted to resume her marriage to him. I take into account the fact that when the respondent refused entry clearance, the sponsor obtained a visa for Ethiopia and took her daughter out there to spend time with the appellant.
24. I also have regard to the decision of the Upper Tribunal in *Goudey v Entry Clearance Officer Cairo* [2012] UKUT 000041 (IAC) when it held that:

*" i) GA ("Subsisting" marriage) Ghana \* [\[2006\] UKAIT 00046](#) means that the matrimonial relationship must continue at the relevant time rather than just the formality of a marriage, but it does not require the production of particular evidence of mutual devotion before entry clearance can be granted.*

*ii) Evidence of telephone cards is capable of being corroborative of the contention of the parties that they communicate by telephone, even if such data cannot confirm the particular number the sponsor was calling in the country in question. It is not a requirement that the parties also write or text each other.*

*iii) Where there are no countervailing factors generating suspicion as to the intentions of the parties, such evidence may be sufficient to discharge the burden of proof on the claimant."*

25. Giving proper weight to the telephone card evidence, and all the other evidence which was before the First-tier Tribunal, I am satisfied that it is appropriate to substitute a finding that this marriage is both valid (which has never been disputed) and at the date of application, that it was 'subsisting' in that both parties had the intention of living together as man and wife when it was possible for the appellant to rejoin the sponsor in the United Kingdom.
26. I therefore substitute a decision allowing the appeal. As there is a very young child involved, I reverse the decision of the First-tier Tribunal not to make an anonymity order, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

## DECISION

27. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. I remake the decision by allowing the appeal.

Date: 15 May 2018

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson