Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07378/2017

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 22 March 2019	**On 12 June 2019**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ATIF [A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr McGinley, of Gray & Co. Solicitors.
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is a national of Eritrea. His wife, [ST], is recognised in the United Kingdom as a refugee. On 6 August 2017 the respondent refused to grant the appellant entry clearance for settlement as the spouse of a refugee. The appellant appealed; Judge D C Clapham SSC dismissed his appeal. He now appeals, with permission, to this Tribunal.

2. The crucial provision of the Immigration Rules for the purposes of the present appeal is not set out by the judge. It is in paragraph 352A of the Statement of Changes in Immigration Rules, HC 395 (as amended). It

permits the admission of the spouse of a refugee under certain conditions, including the following:

> "(ii) the marriage …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."

The following paragraphs of the Rules set out administrative provisions and then go on to make similar conditions and provisions in relation to the child of a refugee.

3. The facts were in dispute before the judge. It is not easy to see where in his decision he makes findings of fact on the evidence before him, but it appears they are not now seriously in dispute. Ms [ST] is an Eritrean national and was born in 1988. She fled Eritrea owing to a fear of persecution on 1 May 2002. She went to Sudan.

4. She did not claim asylum in Sudan (which is and was at all relevant times a party to the Refugee Convention) nor, so far as we are aware, did she seek to regularise her presence there in any other way. She married another Eritrean national in 2007. She has a stepson and a son from that relationship. We have not heard much about them: they appear to be still in Sudan; they do not feature in the appellant's application and we do not know whether he regards them as related to him. Her first husband died in 2008.

5. She met the appellant in 2011 and married him in May 2012. On 2 May 2014, her second wedding anniversary, she left her husband and other family members and travelled to the United Kingdom. It is not suggested that her travel from Sudan was other than voluntary, although her entry to the United Kingdom appears to have been unlawful and undocumented. She has not claimed to have had any difficulties in the twelve years during which she lived and worked in Sudan; and indeed, she returned to Sudan in 2016 for a holiday to visit her children. In the United Kingdom she claimed, and was granted, status under the Refugee Convention. The grant appears to have been on 8 May 2015.

6. Meanwhile, the appellant was having difficulties in Sudan. His presence there also was illegal, and after his wife left he was detected by the authorities and detained. He bribed his way out of prison and went to Egypt, where he still is. He appears to have arrived there some time in 2016. On 4 December 2016 he made a claim for asylum: that claim was made to the UNHCR, which looks after asylum claims made in Egypt. We have not been told about the progress of that claim. Ms [ST] visited Egypt for a holiday for two weeks in December 2017 and stayed with him in Cairo. The genuineness of the relationship between her and the appellant is said to be evidenced by that visit, by transfers of money, and by

numerous communications. We are content for present purposes to assume that the relationship is genuine.

7. The appellant had made a previous application for entry clearance as the spouse of Ms [ST], which was refused on 26 January 2017. The present application was made on 20 March 2017. It was refused because the respondent was not, on the evidence, satisfied that the parties were related as claimed. In his decision Judge Clapham records that the grounds for refusal were amended before the First-tier Tribunal, but he does not say what the amendment was. Given the terms of a note on the file, and Mr McGinley's consequent application to amend the applicant's grounds, however, we can assume with some confidence that the respondent had added a ground of refusal based on paragraph 352A (ii) and (iii). The grounds before Judge Clapham (which are not set out or referred to in his decision) appear to have been that the relationship was genuine, that it met the requirements of paragraph 352A, and that, if it did not, it was disproportionate and a breach of article 8 to refuse the appellant admission.

8. After hearing evidence from Ms [ST] and another witness, and submissions from the Presenting Officer and Mr McGinley (all of which are set out at length in his decision) Judge Clapham referred implicitly to paragraph 352A and said this:

> "53. … I think that it must be perfectly clear that if someone in the course of flight to the United Kingdom meets and marries a spouse, then that is a post-flight marriage and therefore the relevant provisions of the Immigration Rules would not apply.
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> 54. In terms of the Home Office policy document shown at bundle number 7, it is clear that the policy intention is to allow a spouse or partner of someone granted refugee status to reunite with their partner in the United Kingdom, provided that the person seeking the reunion formed part of the family unit before the sponsor fled the country of origin.
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> 55. I have come (reluctantly) to the conclusion that the way in which the Immigration Rules has been framed does not cover the situation of this particular couple. I fully appreciate Mr McGinley's argument that the person granted asylum had a well founded fear of persecution in Eritrea and therefore left for Sudan where she lived for a considerable period. Mr McGinley's argument is that Sudan then became the country of habitual residence. However, the country that the sponsor left in order to seek asylum must be treated as Eritrea rather than Sudan, and for that reason I consider that I am forced to agree with Mr Young that this is a post-flight marriage."

9. He went on to decide that Ms [ST]'s first husband did indeed die and that the marriage to the appellant was valid. He did not, so far as we can see, express any view on the evidence said to support the genuineness of the continuing relationship. The consequence of the view he had reached at paragraphs 53-55 of his decision was the dismissal of the appeal.

10. Mr McGinley's grounds of appeal, on the basis of which permission was granted, are that the judge erred in law in failing to take into account and follow a decision of the Immigration Appeal Tribunal, AA [2004] UKIAT 00031; and that in any event the appeal should have been allowed under article 8 as the circumstances were exceptional.

11. In AA, the facts were not readily distinguishable from those of the present case. The wife was a Somali national who had fled to Ethiopia where she had married the husband, also a Somali national. The wife had then entered the United Kingdom and obtained status as a refugee; the husband had gone to South Africa, from where he sought entry clearance to join his wife. The Tribunal cited the Final Act of the UN Conference on the Status of Refugees and Stateless Persons, which is the origin of the family unity provisions, and looked at the history of the provisions found in paragraph 352A. It concluded that "in order to seek asylum" meant "in order to make a claim for asylum" and that a person might form a habitual residence in a third country between the country of persecution and the country in which asylum was sought. It therefore allowed the appeal as the marriage had taken place before the wife left Ethiopia in order to claim asylum in the United Kingdom.

12. So far as concerns the first ground, it is wholly unarguable as pleaded. The Immigration Appeal Tribunal was (unlike the Upper Tribunal) not a Superior Court of Record, and (save in the case of "starred decisions" and country guidance) had no power to bind Immigration Adjudicators or even the Tribunal itself in other cases. In the absence of particular arrangements such as those for the continuing force of starred decisions and country guidance decisions, a judge of the First-tier Tribunal is not bound to follow decisions of the Immigration Appeal Tribunal, or of its successor the Asylum and Immigration Tribunal.

13. This is even more obviously the case when the decision in question was not cited. We have examined the judge's full note of the proceedings before him, and it is clear that although Mr McGinley seems to have had many months to prepare his case, he did not refer to any decided cases. To criticise the judge for failing to refer to a case that was not binding on him and was not cited is more than ungracious, and is itself an error of law. A judge is not required to refer to, follow or regard himself as bound by, a decision that is not in law binding upon him.

14. Before us, Mr McGinley's submissions did not go very much further than the assertion that Judge Clapham should have followed AA, presumably having discovered it for himself after the hearing. That would itself have been an error, unless he had reconvened to hear the parties' submissions on it.

15. The question, however, for Judge Clapham as for the Tribunal in AA, was the meaning of paragraph 352A. It would have been open to Mr McGinley to have relied on the arguments found in the determination in AA (though he did not) and to urge Judge Clapham to decide the present case in the

same way for those reasons: he did not do that, either. Further, he did not set out any of those arguments before us.

16. Nevertheless, and despite Mr McGinley's apparent unwillingness to wrestle on behalf of his client with what appears to be the only decision on this provision, we have read AA. After all, if we would have reached the same decision as did the Tribunal in AA, the appellant would be entitled to entry clearance.

17. The decision in AA is by a Tribunal which by its constitution is entitled to the greatest respect: Mr Warr and Mr P Lane (as they then were). It is also to be noted that it does not appear to have been appealed; on the other hand it is not clear that very much notice has been taken of it, and although the Home Office Guidance in force at the date of the present application appears to treat "country of former habitual residence" in paragraph 352A as synonymous with "country of origin" we have heard of no challenge to that policy.

18. It is evident that the phrase "left the country of their former habitual residence in order to seek asylum" is not absolutely clear. If it were, there would have been no debate about it either in AA or in the present case. There is a tension between the notion of leaving a country of "former habitual residence" on the one hand and the doing so "in order to seek asylum" on the other. The Tribunal in AA provided an interpretation which is certainly viable (although not mandatory) if the context of the provision takes a place subsidiary to the words. But, as Lord Steyn remarked in R v SSHD ex parte Daly [2001] 2 AC 532 at [28], "In law, context is everything". When context is taken into account, it seems to us that a number of considerations tend to suggest a conclusion opposite to that reached in AA.

19. The first is the context provided by refugee law. "Country of former habitual residence" is a phrase familiar to all refugee lawyers, because it appears in the central part of the definition of a Convention refugee in article 1A(2) of the Convention. It is an alternative reference point for the fear of persecution, in the case of a person who because he is stateless can have no fear related to a country of nationality. For any refugee lawyer the phrase carries connotations of a country where persecution is feared and return to which is feared. It seems to us in the highest degree unlikely that its use in paragraph 352A, in the Part of the Immigration Rules relating to asylum, was not intended to carry the meaning and implications of its use in the Convention itself.

20. We cannot see why the draftsman should have chosen the phrase unless a reference to the Convention was intended. "Country of their former habitual residence" contains in its six words two or perhaps three tendentious notions, each of which might be properly the subject of dispute as a matter of evidence and as a matter of law in an individual case. What is residence? How does it differ from other forms of sojourn? Does the evidence show that the refugee's stay bore the marks of

"residence"? What is meant by 'habitual'? Is there a psychological element as well as some sort of temporal element? Is residence "habitual" if it is involuntary, for example because a person is in detention, or on bail conditions, or has no travel documents, or cannot afford to travel? Does "habitual" import some notion of an extended stay? Even "country" may cause difficulties if the phrase is divorced from the Convention with its assumption that the word is to be understood in line with other international instruments. Surely if the draftsman meant merely "a place where the refugee lived" he would have said that.

21. Further, still within general refugee law, it is clear that a person who meets the definition in art 1 (taking into account all the reservations and so on found in sub-articles 1B-1F) is a refugee. Such a person may not have been recognised as a refugee, but he is one: the "conferring" of refugee status is merely a declaratory act. Thus, Ms [ST], and the wife in AA, were already refugees immediately upon their leaving the countries in which they feared persecution, Eritrea and Somalia respectively. At that point there was no further scope for them to "seek asylum": they already had it. It is not easy to see that the wording of paragraph 352A, or anything related to its operation, justifies the insertion of a notion of making a formal application to be allowed to remain as a refugee in a safe country other than the one in which the applicant already is.

22. The second context is that provided by European law. There is no direct link between the Immigration Rules and European law, but both are attempts to apply the international obligations arising from the Refugee Convention and associated instruments. It seems to us that the assumption made by the relevant Directives and Regulations is that family unity is restricted to those who were members of the family in the place of persecution or feared persecution. Thus, article 2(h) of the Qualification Directive, 2004/83/EC, defines the family members, who are entitled to benefits as such, as those with a particular relationship to the applicant "in so far as the family already existed in the country of origin". Article 23, under the heading "maintaining family unity" gives family members as so defined the same benefits as the refugee or beneficiary of humanitarian protection; and paragraph 5 allows Member States to extend benefits to "other close relatives who lived together as part of the family at the time of leaving the country of origin and who are dependent". There is no suggestion that family acquired after leaving the country of origin should obtain the same benefits. "Family members" are defined similarly in the Reception Directive, 2003/9/EC.

23. Regulation 604/2013/EU, Dublin III, also defines family members in this way. Although for the purposes of status determination any family member may (subject to written request) form the starting-point for the identification of the responsible Member State, there is no suggestion here either that after-acquired family should have the same benefits as those who were family members at the time of leaving the country of origin.

24. Of course it is open to a Member State to treat individuals more generously than the Directives require, but we see no real signs of an intention to do so. In the circumstances it appears to us that paragraphs 352A ff should be interpreted in a way that is consonant with relevant European legislation.

25. The third context is that of the Rules itself. A person who can rely on the family provisions of paragraphs 352A ff of the Immigration Rules does not have to meet the financial and other requirements that the Rules impose on family immigrants generally. There is thus a clear benefit being offered to the family members of refugees, provided that the family members meet the requirements of these paragraphs. But it does not, with respect, seem very likely that it was intended to offer those benefits to people who themselves have no connexion with persecution, who may have no link with any country of persecution, and who have formed a family link with a refugee at a time when the refugee was not at risk of persecution but was simply making an unhurried choice about where to settle after obtaining safety. To give a benefit to such a person might be seen as an encouragement of forum-shopping and an endorsement of the benefits of doing so. What is particularly odd if the interpretation in AA is correct is that the longer the refugee delays before making a claim, the more likely it is that his residence in the safe country will be regarded as 'habitual' and the greater the chance of family members' success under paragraph 352A ff; conversely, the refugee who claims promptly after leaving the country of persecution can be the conduit of benefit only to family members in the country of persecution itself.

26. For these reasons we think this is a case where context is a vital factor in interpretation. It is therefore not open to a Tribunal to interpret the phrase "country of former habitual residence" by looking only at what is conveyed by the ordinary meaning of the words. The phrase does not appear with the restrictions on its application that are in article 1A(2), but there is no obvious objection to its being understood as meaning a country of persecution, identified without specific regard to the question of anybody's nationality. Context requires that it be read as meaning "country of origin", that is to say the country in which persecution is feared; and that it is the leaving of that country, in order to seek asylum somewhere, whether in the first country or a later one, and whether by formal claim or by de facto safety, that forms the *terminus ad quem* for the acquisition of relatives capable of falling within paragraphs 352A ff.

27. We have trodden this path with caution, because, as we have indicated, Mr McGinley raised no full argument before us, and so Mrs O'Brien had no chance to respond. But for the reasons we have given we are not persuaded by Mr McGinley that the judge erred in law by taking the approach he did. We therefore reject ground 1 at all the levels at which we have been able to examine it.

28. Ground 2, the article 8 claim outside the Rules is, as presented, quite hopeless. As the appellant is not entitled to enter as the spouse of a

refugee, he must expect to meet the financial requirements of the Rules for spouses. Nothing in the material before the Tribunal at either level, or before the Secretary of State, begins to show that it would be disproportionate to exclude him if he cannot meet those requirements. If he can meet them, it is obviously not disproportionate to expect him to make the appropriate application.

29. The appeal is dismissed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 4 June 2019