



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001207

First-tier Tribunal No: HU/57115/2022
IA/10142/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 1 July 2024**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

ASMEROM MICHAEL HABTOM
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr M Afzal, legal representative, Global Migration Solutions UK Ltd

For the Respondent: Miss C Newton, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 18 June 2024

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Ficklin dated 20 February 2024.
2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.
3. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 18 March 2024.

Anonymity

4. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

5. The appellant is a national of Eritrea who, on 25 October 2021 applied for leave to enter the United Kingdom under paragraph 352A of the Immigration Rules to join Z, said to be his wife, who is a recognised refugee in the United Kingdom. That application was refused in a decision dated 8 September 2022.
6. The appellant made five previous applications which were all refused principally on the basis that it was not accepted that he was married to the sponsor or that his relationship with the sponsor predated her flight from Eritrea.
7. In the instant decision, the respondent reproduced the most recent decision and considered the representations made but concluded that the appellant had not shown that he met paragraphs 352A i, ii, iii and v of the Immigration Rules.

The decision of the First-tier Tribunal

8. The hearing before the First-tier Tribunal took place over two dates. In a succinct decision, the judge accepted that the relationship between the appellant and sponsor was genuine and subsisting notwithstanding the fact that the sponsor had given birth to two children with another partner during the course of the marriage to the appellant. The appeal was allowed on Article 8 grounds.

The appeal to the Upper Tribunal

9. The grounds of appeal upon which permission was granted are two-fold:
10. Firstly, it was argued that the judge made a mistake of fact in basing their decision on a misunderstanding that the respondent accepted that the marriage took place.
11. Secondly, it was argued that the judge made a material misdirection in law in failing, when considering whether there was a genuine and subsisting relationship, to adequately resolve the issue of the sponsor giving birth to two children who were not the appellant's.
12. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

The primary question for the Judge was whether the Appellant and Sponsor were married and the Judge proceeded on the basis that that had been accepted when it was still in issue. It is arguable that the Judge erred in the approach to the nature of the relationship and whether it was, in the circumstances, genuine and subsisting.

The error of law hearing

13. The matter comes before the Upper Tribunal to determine whether the decision contains an error of law and, if it is so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties as above. Both representatives made submissions and the conclusions below reflect those arguments and submissions where necessary. A bundle was submitted by the Secretary of State containing,

inter alia, the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal.

Discussion

14. At [8], the judge records that the respondent accepts that the marriage between the appellant and sponsor took place in 2013. There is no support for this finding in the decision letter. Indeed the decision letter clearly states that the appellant's family reunion application was refused under the following provisions of paragraph 352A
- (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 or the parties have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more before the person granted 264 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) n/a
 - (v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine subsisting;
15. Given that it is not the appellant's case that he lived with the sponsor in a relationship akin to marriage which had subsisted for two years, it was incumbent upon him to prove that he was the sponsor's partner either by way of marriage or civil partnership. The judge does not explain why they thought that the fact of the marriage was accepted, given the clear indication in the decision letter that it was not along with the respondent's steadfast rejection of the marriage over a period of many years and negative decisions. This mistake of fact amounts to a material error of law by itself.
16. In relation to the second ground, the judge made no independent findings in relation to his conclusion that the relationship between the appellant and sponsor was genuine and subsisting. There was a conflict in the evidence to be resolved, which related to the fact that the sponsor had two children with another man during the course of her claimed marriage to the appellant. The appellant claims that these children resulted from one night stands. The judge merely states that he found the sponsor credible but, other than listing elements of the documents submitted by the appellant, gives no reasons for this conclusion. The judge's failure to adequately resolve the issues around the sponsor giving birth to two children with another partner goes to a core issue in the appeal, that of whether any relationship is genuine and subsisting and thus amounts to a further material error.
17. During his submissions, Mr Afzal had to be restrained from giving evidence as to the evidence and submissions before the First-tier Tribunal. His evidence included a claim that the sponsor's parents attended the hearing and gave evidence. I merely note that there is no mention of these witnesses in the decision and reasons.

18. I canvassed the views of the parties as to the venue of any remaking and both were of the view that the matter ought to be remitted if there were no preserved findings of fact. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I carefully considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statements. I took into consideration the history of this case, the nature and extent of the findings to be made as well as the fact that the nature of the errors of law in this case meant that the respondent was deprived of an adequate consideration of the human rights appeal. I further consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and therefore remit the appeal to the First-tier Tribunal. I should add that the sponsor did not attend the hearing before the Upper Tribunal as she had, according to Mr Afazal, an ESOL examination.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except First-tier Tribunal Judge Ficklin.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 June 2024