Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-000047 (HU/06526/2020)

THE IMMIGRATION ACTS

Heard at Manchester
On the 2nd September 2022

Decision & Reasons Promulgated
On the 17 November 2022

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Zewdi Asemlash Tekle
(no anonymity direction made)

Appellant

and

Entry Clearance Officer

Respondent

For the Appellant: Mr G. Brown, Counsel instructed by Binas Solicitors
For the Respondent: Mr A. Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Eritrea born in 1990. She appeals with permission against the decision of the First-tier Tribunal (Judge Curtis) to dismiss her human rights appeal.

2. The matter in issue before Judge Curtis was whether or not the Appellant qualified for entry clearance as the spouse of a refugee

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present and settled in the United Kingdom. The matter in issue in this appeal is whether, in deciding that she did not, Judge Curtis erred in law.

Background

3. The Appellant is the wife of Mr Heyab Bereket, an Eritrean national who has been recognised as a refugee in the UK since November 2009. There is no dispute as to the legality of the marriage which took place on the 24th April 2008. Nor is there any dispute that the marriage pre-dated Mr Bereket's flight from Eritrea, which took place in November 2008.

4. The Appellant made her application for entry clearance on the 25th February 2020. She stated that she wished to rely on the family reunion provisions in the immigration rules relating to the family members of refugees.

5. The ECO refused the application on the 28th April 2020. The ECO had regard to the facts presented and applied the relevant rule, paragraph 352A of the Rules:

> 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 permission to stay 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 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 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 (as defined in Section 36 of the Nationality and Borders Act 2022) 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

(vi) the applicant and their partner must not be within the prohibited degree of relationship; and

(vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

6. The ECO noted that the couple had been separated for some 11 years and that there was very limited evidence of contact between them during that time. Given that the ECO concluded that the Appellant could not demonstrate, on a balance of probabilities, that she met the requirements of 352A(v).

7. When the matter came before the First-tier Tribunal the Appellant called evidence from her husband (the sponsor). He confirmed in oral evidence that he had acted as a sponsor in two other applications for refugee family reunion: he had sponsored his two younger brothers in their applications to come to the UK, one arriving in 2015/16 and the other in 2017/18. He had not managed to sponsor his wife any earlier because she had been stuck in Eritrea. She was not able to make this claim until after she got to Ethiopia, in October 2019. The Sponsor asserted that his wife had made several other attempts to flee Eritrea but she had been caught at the border and returned home in "a very humiliating way". He asserted that he had supported his wife financially and that they had maintained contact by telephone.

8. Judge Curtis dismissed the appeal. He found inconsistency in the Sponsor's evidence that he had been frightened for his wife living on her own, because it was said elsewhere that she had been living with her family. No detail was provided about the Appellant's attempts to leave Eritrea or in what way she had been humiliated, and these claims were therefore rejected. If it was a subsisting marriage she would have tried to join him sooner. The claim that the couple stayed in contact by short calls to a neighbour's telephone, because they were worried about phone tapping by the Eritrean security forces, was unsupported by country background material. It was unclear how she managed to get a smart phone in a refugee camp but could not use one in Eritrea. Only six money transfer receipts were provided, and a photocopy of three cheap rate phone cards. No evidence was produced of any contact by way of messaging services such as Whatsapp. Evidence was produced that the Sponsor had once sent his wife a parcel, but in light of the "significant shortage of supporting documentation" the Tribunal could not be satisfied that the burden of proof had been discharged.

The Challenge

9. Mr Brown's grounds advance four grounds of appeal, which in reality boil down to three. It is submitted that the Tribunal has failed:

i) To give any or adequate reasons for rejecting the oral evidence given by the Sponsor

ii) To take a flexible approach to the evidence in accordance with the relevant guidance on processing refugee family reunion claims

iii) To assess the issue of 'subsistence' in line with established caselaw

10. In granting permission Upper Tribunal Judge Plimmer did not limit the grant but thought there particular arguable merit in ground (ii).

11. By a rule 24 response dated the 5th April 2022 and in oral submissions the Secretary of State opposed the appeal. It is submitted that the guidance on family reunion applications is not so broad that applicants can succeed on the basis of no evidence at all. There was an exceptionally long delay in this case and in the absence of good reasons for it the Tribunal was entitled to place weight on the fact that the sponsor secured the reunification rights of his younger brothers before those of his wife. There was an inconsistency in the Sponsor's evidence about whether his wife lived alone and viewed holistically the Tribunal was entitled to reach the conclusion that it did.

Findings and Reasons

12. In respect of ground (ii) Mr Brown stresses that in any matter relating to refugees decision makers should not look to documentary evidence for corroboration, because of the inherent difficulties that refugees and their families might face in producing such materials. The guidelines relied upon in the grounds, and presumably before the First-tier Tribunal, are in the UNHCR policy document 'Family Integration in the Context of Resettlement and Integration Protecting the Family: *Challenges in Implementing Policy in the Resettlement Context'.* This notes that the absence of documentary proof should not "in itself" affect the credibility of an application, and that a flexible approach should be taken. The reason for that is explained as follows:

> "Applicants and sponsors in family reunion cases may not be able to provide the level of evidence that would be required for other applications under the Immigration Rules, due to the nature of refugee journeys….caseworkers must be mindful of the difficulties that people may face in providing documentary evidence of their relationship or the fact that it is subsisting. Those fleeing conflict zones or dangerous

situations may not have time to collect supporting documents and may not realise they would be required".

13. As Mr Brown notes, that guidance reflects the principle now regarded as trite in this Tribunal that refugees should not be required to corroborate their accounts with the production of documentary evidence. I do not however agree that it is a principle which is easily applied in this case, because the documentary evidence that the First-tier Tribunal was concerned to see did not emanate from Eritrea; it would emanate, if it existed, from the Sponsor in Manchester, with the Tribunal drawing adverse inference from the absence of extensive call logs or money transfer receipts. To continue the analogy to refugee claims, it was easily available evidence of the type identified in TK (Burundi) v Secretary of State for the Home Department [2009] EWCA Civ 40. I am not therefore satisfied that there was an error in the Tribunal's reasoning on those matters.

14. I am however concerned about the approach taken to the evidence overall, and to the Sponsor's evidence in particular. The whole point in this case is that this was a family fleeing one of the world's most closed, and repressive, regimes. The country guidance caselaw on the difficulties that its citizens face in leaving Eritrea is long standing and well established: see for instance MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT 00059, MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 00190 (IAC) and most recently MST and Others (national service – risk categories) Eritrea CG [2016] UKUT 00443 (IAC). It was against this background that the case put had to be evaluated. That case was that this young woman tried and failed on a number of occasions to leave Eritrea illegally, and that she failed. As soon as she succeeded, she made the application leading to this appeal, something she was not able to do while still trapped in Eritrea. This is why there has been a delay, and she now wishes to be with her husband and start their married live together properly.

15. The reasons given for rejecting that account are to me unclear. The account given of her trying to flee Eritrea on earlier occasions is rejected on the basis that it is "vague", but nowhere does the Tribunal consider the fact this young woman is now recognised as a refugee in Ethiopia. The clear inference to be drawn from that fact is that she has a well-founded fear of persecution in Eritrea; we know that at least three other members of her family (her husband and brothers in law) have been similarly recognised; those were plainly material facts to be considered in the balance when evaluating the credibility of her claim that she tried to flee on earlier occasions but had been caught at the border and returned to her home. It is not clear whether clarification or more detail was sought from the Sponsor on this matter but it may simply be that the Appellant – and those representing her – considered that in light of the country guidance cases the facts spoke for themselves, and that no more detail was needed. This was a critical part of the evidence, because it explained

the reason for the delay, which was the central reason why the ECO did not believe this marriage to still be subsisting.

16. Moreover the decision contains no clear finding on the evidence of the Sponsor, and indeed the Appellant, about their continued intention to live together. It is true that the Tribunal identifies some discrepancy in the evidence about whether the Appellant lives "alone" in Eritrea or with members of her family, but again it is not apparent to the reader whether clarification was sought about that matter, nor indeed whether, or why, it justified a wholesale rejection of the otherwise consistent evidence of the parties to this marriage. The evidence of the Sponsor was at the heart of this appeal, and I am satisfied that the failure to make clear findings on whether that evidence – particularly his stated intention to live with his wife - could be accepted or rejected was a material error of law. That being the case I am satisfied that the decision in the appeal needs to be remade and I need not deal with ground (iii).

Decisions

17. The decision in the appeal is set aside for error of law.

18. The decision is to be re-made in the First-tier Tribunal by a judge other than Judge Curtis.

19. There is no order for anonymity.

Upper Tribunal Judge Bruce
25th October 2022