



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

Appeal Number: OA/05558/2011

THE IMMIGRATION ACTS

Heard at Columbus House, Newport

On 17 September 2013

Determination

Promulgated

On 11 October 2013

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

KHADRA ABDI JAMA

Appellant

and

ENTRY CLEARANCE OFFICER - ADDIS ABABA

Respondent

Representation:

For the Appellant: Mr D Bazini instructed by South West Law

For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Somalia who was born on 1 January 1985. On 4 January 2011, she applied for entry clearance to the United Kingdom as the spouse of a refugee under para 352A of the Immigration Rules (HC 395). On 5 January 2011, the Entry Clearance Officer at Addis Ababa refused the appellant's application on the basis that he was not satisfied: (1) of the appellant's identity; (2) that the parties' marriage was subsisting

and that they intended to live together permanently; and (3) that they had ever lived together as husband and wife.

2. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 21 June 2011, Judge L Murray dismissed the appellant's appeal. Judge Murray was not satisfied that the appellant and sponsor were married as claimed. On 27 July 2011, the First-tier Tribunal (Judge Davey) granted the appellant permission to appeal to the Upper Tribunal on the basis that the judge had arguably made contradictory findings in relation to the evidence of a witness, Mr Bashir Nur, having accepted his evidence that the appellant and sponsor had become engaged in 1992 but rejecting his evidence that they married in 1999 (as the appellant claimed) on the basis that he was a relative and not an independent witness.

The UT Appeal

3. Following a hearing on 11 January 2012, the Upper Tribunal (DUTJ Bowen) concluded that Judge Murray had erred in law on the basis that permission to appeal had been granted. Judge Bowen's reasons are set out in his decision of that date which I do not repeat here.
4. The appeal was initially relisted for a resumed hearing on 28 January 2013 before DUTJ J F W Phillips. That hearing had to be adjourned because an interpreter was not available. However, at that hearing the appellant's then representative (Mr S Chelvan) invited DUTJ Phillips to remit the appeal to the First-tier Tribunal. Some discussion took place and the Presenting Officer (Mr I Richards) confirmed that the respondent no longer challenged the appellant's identity. It would appear that discussion took place as to whether any of Judge Murray's findings should be preserved. The judge's Record of Proceedings records the discussion but not the outcome.
5. Before me, Mr Bazini referred to a note of the proceedings prepared by Mr Chelvan which records that Judge Phillips declined to remit the appeal to the First-tier Tribunal, retaining it in the Upper Tribunal but preserving Judge Murray's finding in para 34 of her determination that the appellant and sponsor were engaged in 1992. Mr Richards, who appeared for the respondent before me (as he had done before Judge Phillips) was unable to recollect what had been Judge Phillips' decision in relation to the preserved facts, if any, of Judge Murray's determination. The Home Office file also did not record the outcome of Judge Phillips' decision.
6. Having heard from both Mr Bazini and Mr Richards, I indicated that the best contemporaneous note was that of Mr Chelvan and I, therefore, accepted that Judge Phillips had indicated that the positive finding in Judge Murray's determination that the appellant and sponsor became engaged in 1992 should be preserved. I note that Judge Bowen in para 6 of his decision in January 2011 indicated that no findings were preserved but, in my judgment, in accordance with the view of Judge Phillips, the error identified by Judge Bowen does not taint the positive finding in favour of

the appellant in paragraph 34 of the determination. Consequently, the appeal before me proceeded on the basis that that finding was preserved.

The Evidence

7. It was accepted by both representatives that the sole issue for me under para 352A was whether the appellant and sponsor were married as they claimed. Mr Richards accepted that if I found in the appellant's favour on this issue then the appeal should be allowed under para 352A of the Rules.
8. At the hearing, the sponsor Mustafa Sharif gave oral evidence before me. He adopted his statements dated 24 May 2011 (at pages 1-3 of the bundle) and 22 January 2013 (at page F of the bundle). In cross-examination, he confirmed that he had married the sponsor in 1999. He confirmed the name of his wife and that when they got married she was around 14 years of age. It was put to him that when he claimed asylum the sponsor had said in his statement that he had married the appellant in early 1992. He said that he did not know how that had happened and he had married the appellant in 1999. He said that he did not understand the difference between engagement and marriage. He said that he had made a mistake and he was confused between the two dates. He said that after he and the appellant were married in 1999 they lived together for five to six months. During that time living on the sponsor's family farm, they had had difficulties with the militia who had taken over the farm. He confirmed that those problems had begun before the marriage. He was asked why the appellant's family had agreed to the marriage at that time if there were these problems. The sponsor said that there were difficulties at that time but the situation in the country was better than it had been before.
9. The sponsor was asked about Mr Bashir Nur (his first cousin) and whether he attended the wedding. The sponsor said that he was not present but his siblings were. Mr Nur stayed in his shop to sell. When asked who attended from Mr Nur's family, the sponsor said it was his father and his sister whose name was Kaltun. He said that as far as he could remember those were the only two although there may have been others. He was asked why there was such a long period between the engagement in 1992 and the marriage in 1999. The sponsor said that at the beginning the situation in Somalia was very bad and the second reason was that the appellant was very young. He said she was between 14 and 15 in 1999. He could not remember the exact date of their marriage but he said it was around June in 1999. He said that he left at the end of that year - the last month of the year. He said that the militia took over his farm in 1992. It was put to him that although he became engaged in 1992 he had in fact never married the appellant. The sponsor said that was not right. The situation was very difficult and that was how things went.
10. Mr Bashir Nur also gave oral evidence. He adopted his statement dated 24 May 2011 (at pages 4-5 of the bundle). He confirmed that he was the cousin of the sponsor. He said that he had attended the sponsor's engagement in 1992. However, he said that he had not attended the

wedding but members of his family went there. When he was asked which members of his family, Mr Nur replied that it was his father and “some of my siblings”. When he was further asked how many of his siblings he replied that it was one person and that it was his sister Kaltun.

11. Finally, Ahmed Abdi Ibrahim gave oral evidence. He adopted his statement of 24 June 2013 (at A23-A24 of the bundle). He confirmed that he had taken \$800 at the sponsor’s request to the appellant in May 2012. He had flown to Djibouti and two days later had met the appellant whom he had contacted by phone. He said that they met in a Somali restaurant in Ethiopia (in his statement he says he went to Dira Dawa on the Djibouti/Ethiopian border). He said that they met and he gave her the money. He said that they sat and talked and the appellant told him about the condition of her mother and the situation that she lived in. The appellant asked about the sponsor, how he was and his situation. He was asked whether he had been told what the \$800 was to be used for and he said he was told that it was to finance the appellant’s mother’s hospital.

The Law

12. The burden of proof in this appeal is upon the appellant to establish on a balance of probabilities that she meets the requirements of the Immigration Rules, namely para 352A. The sole issue is whether the appellant has established on a balance of probabilities that she and the sponsor are married as claimed.

The Submissions

13. On behalf of the respondent, Mr Richards invited me to conclude on the totality of the evidence that the marriage had never taken place. He pointed out that the sponsor had made a very clear statement when making his asylum claim that he had married in 1992. Mr Richards submitted that that was not a confusion between the date of engagement and marriage because the sponsor says that the appellant came to live with him and his family. He reminded me that in 1992 the appellant was approximately 7 years of age. He accepted that it was possible that there was some sort of engagement in 1992 with a view to marriage at a later date. Mr Richards submitted that given the deteriorating situation in Somalia between 1992 and 1999, it was not plausible that the appellant would leave her family home at the age of 14 and marry the sponsor and live on his family farm occupied by the militia. He submitted that the appellant had failed to establish on a balance of probabilities that the marriage ever took place.
14. On behalf of the appellant, Mr Bazini submitted that it was a short step once it was accepted that this was an arranged marriage within Somali traditions to find that the appellant and sponsor had married in 1999 having become engaged in 1992. He reminded me that in his screening interview (at 4.1), the sponsor had said he was “married”. Mr Bazini submitted that the sponsor had given this detail from the outset. He also

pointed out that it was recorded in that interview that the sponsor became upset when referring to his marriage. Mr Bazini submitted that it was not believable that the sponsor would make up his marriage in 2009 at his screening interview and feign being upset at a time when that issue was not central to his claim.

15. Mr Bazini also referred me to the statement of Derek McConnell dated 20 May 2011 who is the solicitor having conduct of the appellant's application for entry clearance. He drew my attention to the copy of the application form as originally drafted which had "1999" crossed out and replaced by "1992". Mr Bazini referred me to the sponsor's explanation of this in para 6 of his statement dated 24 May 2011 where he explains that he had not noticed that during his asylum claim it was recorded that he had married in 1992. That was wrong, he was engaged in 1992. He explains that the application by the appellant originally said "1999" but was "scored through" and changed to "1992". That occurred because he decided to stick with the date originally given for the wedding when he first came to the UK. He said he was simply trying to be consistent with what he had said before. He regrets that he did not at an earlier time deal with the fact that the date of his marriage was initially wrongly recorded.
16. Mr Bazini relied on the evidence of Mr Bashir Nur. He submitted that his evidence was consistent with that of the sponsor. In particular, Mr Nur had been accepted as credible in his asylum claim. His evidence that the parties became engaged in 1992 had been accepted and in his oral evidence he had agreed with the sponsor as to which members of his family had attended the appellant's wedding. He had not attended but his father and sister, Kaltun, had done so. Mr Bazini submitted that there was no reason to disbelieve Mr Nur that the marriage had taken place in 1999.
17. Mr Bazini also relied upon the evidence of "intervening devotion" in the form of a number of remittances made by the sponsor to the appellant (at pages 46-56 of the bundle) beginning in 2010. He also relied upon the evidence concerning the \$800 taken by Mr Ibrahim in May 2012.
18. Mr Bazini submitted that, contrary to Mr Richards' submission, it was not implausible that the appellant's marriage should go ahead, despite the prevailing situation in Somalia. He submitted that that suggestion failed to understand human nature in awful situations where life simply had to carry on. He submitted that the appellant was as much in danger if she stayed at her family home as she was living with the appellant. He submitted that it was not implausible that the appellant would marry at the age of 14.
19. Mr Bazini submitted that, in effect, the only matter against the appellant was the reference to "1992" as being the date of his marriage in his initial asylum claim. The remaining evidence was in his favour and he had offered an explanation as to that mistake. He submitted that on a balance of probabilities the appellant had established that she was married to the sponsor and therefore met the requirements of para 352A.

Discussion and Findings

20. In reaching my decision, I have considered all the evidence to which I was referred and which was relied upon by the parties in this appeal.
21. First, having heard both the sponsor and Mr Nur give evidence, I formed the clear view that they were seeking to tell the truth. In one material respect, their oral evidence concerning the claimed marriage of the appellant and sponsor in 1999 was challenged in cross-examination. That was in relation to who attended the appellant's marriage ceremony. The evidence, set out in the witness statements, is that the marriage took place in Afgoye. Both the sponsor and Mr Nur independently confirm that Mr Nur had not attended but both identified two members of Mr Nur's family, namely his father and sister Kaltun, who had done so. In giving those answers, both witnesses in cross-examination left me with the certain impression that they were recalling this information from their memories of the time. The credibility of Mr Nur and indeed the sponsor, have both been previously accepted in their asylum claims.
22. Secondly, there is evidence of "intervening devotion" in the form of payment made by the sponsor to the appellant including a sum of \$800 taken by Mr Ibrahim in May 2012. Mr Ibrahim, of course, gave evidence that he met the appellant and that the whole context of the meeting was that he was carrying money from the appellant's husband to her in order to pay her mother's hospital bills. Mr Ibrahim also told me that the appellant asked about her husband, the sponsor. Mr Ibrahim was not cross-examined by Mr Richards and his evidence is, therefore, unchallenged.
23. Thirdly, as regards the sponsor's statement in his asylum claim in 2008 that he had married in "1992" rather than as he now claims in 1999, I accept Mr Bazini's submissions based on the evidence of the sponsor himself and of Mr McConnell that this was indeed a mistake which the appellant sought to perpetuate (although initially in the appellant's application form 1999 was included) in order to maintain consistency. That was, obviously, a somewhat foolish course of action as the current appeal demonstrates. However, it has to be seen in the light of the fact that the sponsor has always claimed that he was married. That was said in his initial screening interview as Mr Bazini pointed out to me. I do not accept that having given the interviewer that information the sponsor would feign distress such that the interview had to be paused, if it was not the fact that he was indeed married as he said.
24. Fourthly, I see nothing implausible in the claimed circumstances of the appellant's marriage. Those were that she became engaged in 1992 as a result of an arrangement between her and the sponsor's family at a time when she was 7 years of age. Seven years later she married the claimant and moved to live with him on his family farm. I do not accept Mr Richards' submission that that is simply implausible given the deteriorating situation in Somalia that she should move to a farm which

the sponsor claims was controlled by the militia. As Mr Bazini submitted, in effect, 'life goes on' in dreadful situations including those of conflict such as existed in Somalia. Indeed, the risk to the appellant of living with her husband's family would not necessarily be so different from that of living with her own family as to dictate that no rational person would, despite being engaged, choose to marry and live with her husband.

25. I have set out above the substance of the submissions made by both representatives. No other submissions were made relying on any further inconsistencies (if any) in the evidence.
26. For the above reasons, I accept the evidence of the sponsor and Mr Nur, and also that of Mr Ibrahim which was unchallenged. On the basis of the evidence before me, I find that the appellant and sponsor were married in Somalia in 1999 and that they lived together for a period of some five to six months in 1999 before being separated.
27. It being accepted that this was the only issue in dispute under para 352A, I find that the appellant has established on a balance of probabilities that she meets the requirements of para 352A and the appeal is allowed on that basis.

Decision

28. The decision of the First-tier Tribunal dismissing the appellant's appeal under the Immigration Rules involved the making of an error of law and is set aside.
29. I remake the decision allowing the appellant's appeal under para 352A of the Immigration Rules.

Signed

A Grubb
Judge of the Upper Tribunal