IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002562

First-tier Tribunal No: HU/00222/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 October 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

MM
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Afzal, instructed by Global Migration Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 21 October 2024

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside, in a decision promulgated on 21 March 2024, of the decision of First-tier Tribunal Judge Freer.

2. The appellant is a citizen of Eritrea, born on 10 January 1995. He made an application, on 29 December 2021, for entry clearance to the UK to join his spouse, FK, who had been granted refugee status on 16 June 2021, with five years' leave to remain valid until 15 June 2026 following her arrival in the UK on 21 November 2018.

3. The appellant's application was refused on 7 December 2022. The application was considered under paragraph 352A of the Immigration Rules. The respondent

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considered that there was insufficient evidence to demonstrate that the appellant met the requirements of paragraph 352A(i), (ii), (iii) and (v). It was noted that the only evidence submitted to show a pre-flight relationship consisted of a single marriage certificate and that the evidence of a post-flight relationship was dated from November 2021 which was three years after the sponsor had arrived in the UK. The respondent considered that there was therefore no current relationship between the appellant and the sponsor. It was considered that there was no evidence of any exceptional or compassionate circumstances justifying a grant of leave outside the rules.

4. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Freer on 12 April 2023. The sponsor, FK, gave oral evidence before the judge. The judge found the sponsor to be a credible witness and accepted that there was a genuine relationship between her and the appellant. He accepted the sponsor's evidence that she and her husband had grown up living close together in the same community in Eritrea and that they had fallen in love with each other when she was about 19 years of age and had started to cohabit at that time; that they had both tried leaving the country together but the appellant had been detained by border patrol and had later made his way to Khartoum, Sudan after escaping from prison; that they had married at in church in Khartoum on 15 July 2017; that the sponsor had migrated to Denmark before the marriage; and that by the time she came to the UK her husband had left Sudan and travelled to Uganda where he had been recognised as a refugee. The judge accepted the explanation for the delay between the sponsor being granted refugee status in June 2021 and the appellant's application to join her and he then went on to draw his conclusion from those accepted facts. His conclusion was that the appellant met the requirements of paragraph 352A of the immigration rules and that that was determinative of her Article 8 appeal. He allowed the appeal, in a decision promulgated on 24 April 2023.

5. The respondent sought permission to appeal to the Upper Tribunal on the ground that the judge had erred by finding that the appellant met the requirements of the immigration rules when she could not meet the requirements in paragraph 352A(ii).

6. Following a grant of permission, the matter came before me on 8 March 2024. In a decision promulgated on 21 March 2024, I set aside Judge Freer's decision, as follows:

> " **Discussion**
>
> 8. The Secretary of State's grounds set out the requirements of 352A(i) and (ii) as follows:
>
> "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 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"
>
> 9. As Mr McVeety pointed out, Judge Freer recorded at [24] of his decision that the evidence was that the sponsor was born in 1995 and was about 19 years old when she and the appellant fell in love and started to cohabit, which would mean that they did not begin to cohabit until 2014. The judge also recorded, at [8], that the appellant and sponsor were married in July 2017 and, at [9], that the sponsor moved

to Denmark in 2014. On the basis of that chronology, the sponsor and appellant's marriage took place after the sponsor left Eritrea and, equally, the appellant and sponsor did not live together for two years before the sponsor left Eritrea. As such the appellant clearly could not meet the requirements of 352A(ii) and Judge Freer had erred in finding that he could.

10. Indeed, Mr Afzal accepted that that was the case. Mr Afzal's argument, in response to the Secretary of State's case was, however, that that was not determinative of the appeal and that the judge had made a full assessment of the relationship and had taken all matters into account, and not just the immigration rules, when considering Article 8 and finding that the decision was disproportionate.

11. I cannot accept that submission, however, as the judge's findings were clearly made in relation to the genuine nature of the relationship for the purposes of paragraph 352A and, having (erroneously) found the requirements of paragraph 352A of the immigration rules to have been met, he considered that to be determinative of the proportionality issue under Article 8. That is apparent from his findings at [39] to [41]. There was no proportionality assessment which took account of other factors.

12. In the circumstances I agree with Mr McVeety that the judge's error was material to the outcome of the appeal and a full proportionality assessment has yet to be made.

13. Accordingly the judge's decision has to be set aside for a full proportionality assessment to be made on the basis that the requirements of the immigration rules in paragraph 352A are not met. As was agreed, that would involve a consideration of the sponsor's financial and other circumstances relevant to a non-refugee spouse entry clearance under the immigration rules, as well as the appellant's own circumstances. Mr McVeety accepted that the judge's findings were otherwise to be preserved and that the Secretary of State accepted that the appellant and sponsor's relationship was genuine and subsisting."

7. The matter was listed for a resumed hearing on 7 June 2024 and came before me for the decision to be re-made in the appeal, but the hearing was adjourned owing to the sponsor being unavailable due to illness. The matter then came before me again today.

Hearing for the Re-making of the Decision

8. Mr Afzal advised me that a bundle had been prepared for the re-making but it did not appear to have been sent to the respondent or to the Tribunal. Correspondence was subsequently received referring to an attached bundle but in fact the only attachment was a notice of hearing. In any event Mr Afzal said that the relevant document in the bundle was the sponsor's more recent, supplementary statement, which he produced.

9. The sponsor gave oral evidence before me, through a Tigrinya interpreter. She adopted her supplementary witness statement as her evidence in chief and was then cross-examined by Mr Bates. She said that her husband did not have a job in Uganda and was supported by money she sent him, which amounted to £100 to £200 a month. She worked in the UK although not all the time because she suffered from stress as a result of her situation. When she was not working she claimed benefits from the job centre. Her husband had refugee status in Uganda but he had to keep renewing it. She did not think that that status entitled him to work. The sponsor said that she would send money to her husband by Western Union or through people visiting Uganda. She thought she had provided her solicitor with evidence of that. With regard to her strong connections to the UK in terms of friends and her church, she did not have any evidence of that but she received support from those sources. When asked whether she could attend church in Uganda, the sponsor said that she could but that she could

not live in Uganda as she had no status there and no legal right to live there. She wanted her husband to come to the UK because she had a settled life here. In response to my enquiries, the sponsor said that her husband did not do anything in Uganda but was waiting for her to sort matters out here so that he could join her. He lived in shared rented accommodation and paid rent which he shared with the other tenants.

10. Both parties made submissions.

11. Mr Bates asked me to find that the appellant had failed to discharge the burden of proof upon him to demonstrate that there were insurmountable obstacles to his family life with the sponsor continuing outside the UK. There was no evidence from the appellant, no evidence about his accommodation and no evidence to show that he was legally prohibited from working. There was no evidence other than the sponsor's assertions about the difficulties she would face in Uganda. There was no evidence about the status she could have in Uganda and no statements from individuals whom she claimed took money to Uganda for her husband. There was no evidence to show that there were very significant obstacles to the appellant's integration in Uganda or that the consequences of the refusal decision were unjustifiably harsh. It was a matter of choice and the appellant simply preferred to live in the UK with the sponsor. The appellant had not provided evidence of English language ability and he could not meet the financial requirements of the immigration rules, so that there were multiple reasons why an application for entry clearance would fail. The public interest favoured the refusal of entry to the appellant. It was open to the appellant to make a fresh entry clearance application on Article 8 grounds, but supported by evidence.

12. Mr Afzal submitted that the sponsor was a credible witness and that her evidence should be accepted. He accepted that the appellant could not meet the requirements of the family reunion immigration rules and that he could not meet the financial and English language requirements of the spouse immigration rules but he submitted that this was a family reunion case and a broad approach should be taken. This was not a matter of preference but was a matter of circumstances. There was a strong family life which had been established in Eritrea. The sponsor would have difficulty in joining the appellant in Uganda. His leave as a refugee in Uganda was only up until 24 October 2028. There were very significant obstacles to family life continuing in Uganda. It would be very difficult for the sponsor to earn sufficient to enable the requirements of the spouse immigration rules to be met. There was a disproportionate interference with family life.

Analysis

13. It is accepted that the appellant cannot meet the requirements of the immigration rules, either on the basis of family reunion as the spouse of a refugee or in general as a spouse. I also accept, as Mr Bates submitted, that there is limited supporting documentary evidence, particularly in relation to the appellant's circumstances in Uganda, the financial support from the sponsor and the sponsor's circumstances in the UK, and the sponsor's inability to acquire status in Uganda as a spouse of a refugee in that country. Certainly the appellant has not been assisted by the failure of his representatives to produce an appeal bundle for the resumed hearing.

14. Nevertheless I am just persuaded that this is an unusual and exceptional case which has merit and which can succeed on Article 8 grounds, and that there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because the refusal would result in unjustifiably harsh consequences for the appellant and the sponsor. I accept that the public interest weighs heavily against the appellant owing to his failure to meet the requirements of the immigration rules.

However there are circumstances and considerations which, in my view, tip the balance in the appellant's favour.

15.It is relevant to consider the purpose behind the family reunion rules for refugee spouses, which is to reunite spouses from pre-existing relationships who were forced apart by the country situation. I believe that that was what Mr Afzal was referring to when he advocated for a broader approach in refugee family reunion cases. The appellant and sponsor did not cohabit for two years prior to the sponsor leaving Eritrea and the appellant's and sponsor's marriage took place after they had both left Eritrea, so the rules could clearly not be met. However this was not a case of the appellant and sponsor meeting and commencing a relationship subsequent to the events causing them to leave Eritrea: on the contrary, it has been accepted that they commenced their relationship in Eritrea when the sponsor was 19 years of age and that circumstances out of their control led to them being separated, with the appellant escaping from detention in Eritrea and making his way to Sudan and then on to Uganda and the sponsor fleeing Eritrea for Denmark and then coming to the UK where she was recognised as a refugee. It is not disputed that they have managed to maintain their relationship despite being forced into a situation of living in different countries and that the sponsor has visited the appellant when she was able to. However those circumstances have led to them continuing their family life at a considerable distance and without enjoying the usual aspects of family life between husband and wife for many years.

16.A relevant question is whether the appellant and sponsor could nevertheless maintain their family life outside the UK. It is not disputed that they are unable to reside in Eritrea since they are both refugees from that country. It is the respondent's case that they could maintain their family life in Uganda and that there would be no insurmountable obstacles to them doing so. However I am not persuaded that that is the case. Although the burden of proof lies upon the appellant to show that the sponsor would not be entitled to join him in Uganda, it is nevertheless relevant to note that the appellant is not settled in Uganda but has limited status there, albeit as a refugee, and his situation is, to that extent, somewhat precarious. The sponsor currently has no lawful basis of stay in Uganda and her ability to join the appellant in Uganda is therefore uncertain. Further, the sponsor's evidence is that her husband's situation is also precarious in terms of his living circumstances, including the nature of his accommodation and his lack of employment and that she faced difficulties when staying with him during her recent visit. I have no reason not to accept that evidence. Judge Freer found the sponsor to be a credible witness and his findings in that regard were not challenged or set aside. I also found her to be a credible witness. In the circumstances I accept that there would be significant difficulties in pursuing family life in Uganda and that it would entail very serious hardship for the sponsor who is otherwise accustomed to life in the UK having lived here for some six years and who would lose her entitlement to apply for settlement in the UK in the very near future.

17.For all these reasons, and considering the rather unusual and compelling and compassionate circumstances in this case, I am persuaded that refusal of entry clearance to the appellant would result in unjustifiably harsh consequences for him and the sponsor. I consider that such refusal is disproportionate and in breach of the appellant's and sponsor's Article 8 human rights.

Decision

18.The decision of the First-tier Tribunal having been set aside, the decision is re-made by allowing the appellant's human rights appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 October 2024