Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/00145/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 February 2014	**On 4 March 2014**

Before

MR JUSTICE JAY
UPPER TRIBUNAL JUDGE CHALKLEY

Between

MRS ZIKRA IDRIS ABUBEKER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Themistocleous, Legal Representative
For the Respondent: Mr G Jack, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal promulgated on 14 November 2013 whereby the Entry Clearance Officer's refusal to grant entry

clearance to Mrs Abubeker to settle as the spouse of the sponsor, Mr Yassin Idris was upheld. The application was refused under paragraph 352A of HC 395 as amended.

2. The appellant is a national of Eritrea. Her case is that she married Mr Idris in Eritrea on 1 August 2003. She was then aged 14 and the sponsor was aged 18. The sponsor left Eritrea in July 2006 and did not regain contact with the appellant on their case until 2007 by which time he was in the United Kingdom. He was granted some sort of refugee status in 2007 but not indefinite leave to remain until January 2013. The parties have claimed that there was subsequent contact by e-mail, telephone and Skype.

3. In 2012 the appellant fled to Sudan and on 6 May 2012 she was issued with a refugee card. The Entry Clearance Officer refused the application under paragraph 352A(i) and (iv). As for sub-paragraph (i) the requirement that the parties were married the Entry Clearance Officer was not satisfied about a marriage certificate which had been provided because it was in Arabic and "not in the usual format or language". As for sub-paragraph (iv) the requirement that the parties intended to live permanently with each other as spouses and that the marriage was subsisting, the Entry Clearance Officer was concerned about the absence of evidence of contact, in particular evidence which predated the decision which was on 11 November 2012.

4. On appeal the First-tier Tribunal heard evidence from the sponsor and received a witness statement from the appellant. We will focus on the matters in issue but return to them when analysing the grounds of appeal which have been advanced.

5. The sponsor's evidence was that the marriage took place in Keren, Eritrea on 1 August 2003. The respective families were present and two witnesses signed the marriage certificate. According to paragraph 4 of his witness statement "we did have a lot of pictures of our wedding but because I had to escape and my wife also had to escape Eritrea we did not prioritise taking our wedding pictures with us". According to his oral evidence there were no pictures of the wedding. It emerged under re-examination that what the sponsor meant by that was that no pictures were taken at the mosque where the religious ceremony was held but pictures were taken at the house afterwards. As for the marriage certificate the sponsor explained that this was issued by the court and not by the mosque and that Arabic is one of the national languages of Eritrea. That point was not put in issue by those representing the Entry Clearance Officer at the appeal.

6. The sponsor was cross-examined on the basis that the dowry was not mentioned in the marriage certificate. He had given the appellant's family the equivalent of £4,000 so that items of jewellery could be fashioned out of gold. His explanation for the absence of reference to the amount of money in the marriage certificate was that dowries are part of Eritrean tradition.

7. The sponsor also confirmed in evidence that at his asylum screening interview in 2008 he had mentioned the existence of his wife. As for contact between the parties the sponsor stated that this had taken place by phone and e-mail but that they were

now using Skype. It appears from the appellant's witness statement that the use of Skype started in 2013.

8. It is clear from the determination of the First-tier Tribunal that only two e-mails were produced. These were dated 16 June and 26 June 2012. The explanation for the failure to produce earlier e-mails was that the sponsor's e-mail account was locked and he had forgotten his password. The First-tier Tribunal dismissed the appeal largely on credibility grounds, in other words the First-tier Tribunal rejected the assertions made in evidence by the sponsor and by the appellant in her witness statement. We now list the adverse credibility points which the First-tier Tribunal made under paragraph 352A(i).

    - First, at the screening interview in 2008, the sponsor said that the marriage was "registered in mosque" whereas the certificate shows that it was registered at the Keren Shia Court on 5 August 2003.

    - Secondly, the sponsor stated twice in cross-examination that no pictures were taken of the wedding and it was only in re-examination that he clarified that by this he meant that no pictures were taken at the mosque.

    - Thirdly, the First-tier Tribunal was concerned about the circumstances in which the marriage certificate was obtained, the failure to obtain wedding pictures at the same time and as to the delay in the making of this application. All these points are collected under paragraph 40 of the determination.

    - Fourthly, the First-tier Tribunal was concerned about the evidence relating to the dowry which she said was vague and untruthful. At one point the sponsor was saying that "we made" in other words the family made some jewellery out of gold they had obtained. At another point he was saying that they gave the equivalent of £4,000 to the appellant's family to purchase the gold. Under Islamic custom, at least in this region, it was compulsory to give the gift or dowry to the wife.

    - Fifthly, the point was taken that the marriage certificate did not mention a dowry, and

    - Sixthly the point was taken that there was no evidence from the mosque.

9. As for the finding under paragraph 352A(iv) of HC 395 there were four points made:

    - First the First-tier Tribunal gave weight as she put it to the lack of satisfactory evidence of any contact between the parties after the sponsor left Eritrea in July 2006 and his arrival in the United Kingdom.

    - Secondly, the First-tier Tribunal interpreted the two e-mails dated June 2012 as indicative only of the appellant's desire to leave Sudan rather than of a subsisting marriage.

- Thirdly, "all the evidence of contact that is before me postdates the refusal decision" and

- the First-tier Tribunal could not understand why the sponsor did not open another e-mail account or download earlier e-mails by, for example going to an internet café or using a different computer.

10. The First-tier Tribunal also dismissed the claim under Article A but in the circumstances the fate of that claim wholly depended on the claim under the Rules.

11. Various grounds of appeal were advanced in writing and permission to appeal was on our understanding granted on an unlimited basis. We propose to examine the grounds in the order in which they were advanced before us today by Ms Themistocleous but we will adopt our own numbering.

12. The first point is that the apparent discrepancy regarding the marriage and the marriage certificate was not one which was put to the sponsor to deal with in cross-examination. The discrepancy was dealt with by the First-tier Tribunal at paragraphs 43 and 44 of the determination in particular and we have already covered it. On the one hand the sponsor had been saying at his screening interview that the marriage was registered at the mosque, on the other hand the document showed that the marriage was registered at the Keren Shia Court on 5 August 2003. Paragraph 4 of the witness statement provided for the purposes of the appeal stated in terms that two witnesses signed the marriage certificate which is not consistent with the registration and the Keren Shia Court.

13. The real point which is being made by the appellant is that these matters were not put to the sponsor in cross-examination and only emerged very late in the day during the course of the Home Office Presenting Officer's closing address. Indeed the point which the Entry Clearance Officer had made, namely that the marriage certificate was in as it were the wrong language, namely Arabic, had almost fallen away by that stage and in any event was a point which did not find favour with the First-tier Tribunal for very good reason. The difficulty with this submission is that the discrepancy issue was one which emerged before the proceedings concluded and the First-tier Tribunal Judge rose to prepare her determination. It had been flagged up in the course of submissions yet no point was taken by the appellant as to lateness and no application for an adjournment was made. The points as it were were forensic points which could be taken on the face of the documents and were there for the First-tier Tribunal to analyse if she thought fit. Presentationally, in our view, although it does seem slightly harsh, these were points which could and should have been addressed during the course of further submissions and it is now too late to complain on fairness grounds that these points were taken against the appellant.

14. It appeared to us that some sort of irrationality argument was also being founded in relation to the certificates but in our judgment the submissions made fall a long way short of establishing perversity. It may be that the weight to be placed on these discrepancies was somewhat harsh, at least as regards the appellant's prospective

but points or matters of weight are not for this Tribunal, they are for the First-tier Tribunal and the First-tier Tribunal were certainly entitled to reach the conclusions that were reached, in particular at paragraphs 43 and 44 so we reject that ground of appeal.

15. The second ground of appeal at least on our numbering in terms of the point advanced to us today orally was that the fact that the dowry was not mentioned in the marriage certificate or at least its amount was not a point which was raised clearly during the course of the hearing. Again really the same repost can be made to this point, it was a point which came out during the course of submissions on our understanding and it is a point which therefore fell to be addressed by the First-tier Tribunal and indeed by submissions advanced on behalf of the appellant if so advised. This appears to us to be frankly less harsh than the previous point that dowries in Islamic law are very important issues and one would expect the fact and the amount of the dowry to be recorded in the certificate. So it is not as if paragraph 45 of the determination is proceeding on a frolic of its own, it proceeds on the basis of a reasonably solid evidential premise. We reject that limb of the second grounds.

16. There was a second limb of the second ground which related to who was providing the money. On the one hand there was evidence that the family provided the money to the appellant's side as it were to purchase or make jewellery, on the other hand the sponsor was saying "we make jewellery in gold. I have the jewellery made". So there was a discrepancy there. It is true that that discrepancy could have been reconciled on the basis that there was a cultural issue and misunderstanding which arose in all the circumstances. At the end of the day there was not in fact a discrepancy between what was being said at different times but the difficulty here, as with previous and frankly with future grounds of appeal, these were matters of fact of weight of emphasis for the First-tier Tribunal to make the most of, they are not points which can properly be taken on appeal unless we were to decide that the First-tier Tribunal reached an irrational conclusion. We cannot come to that conclusion on this aspect of the case although we do have some sympathy with the appellant's position in relation to that aspect of the appeal.

17. A similar point can be made in relation to the photographs which is the third issue on my numbering which was advanced before us today. The First-tier Tribunal took against the appellant's evidence in relation to the photographs because it was not consistent evidence. He said twice in cross-examination that they did not take pictures of the wedding which on our understanding relates to what happened at the mosque and then he said in re-examination that the picture had been taken at the house afterwards. Now it may well be in line with Islamic custom and law that you cannot take photographs in a mosque since that would be a gross violation of Sharia law. That is not quite the way that the matter was advanced below but if one takes that into account it is quite understandable that it would be completely anathema to anybody in care in Eritrea to contemplate the taking of photographs in a mosque and it would be obvious to them that the photographs of the marriage must be a reference to photographs at the home afterwards. This point again is one that could be regarded as a somewhat harsh one but it was not put to the First-tier Tribunal that

the pictures simply could not have been taken at the mosque for the reason we have given and it may be that we have misunderstood Sharia law or were basing our previous observations on a misunderstanding of local custom and practice. The fact remains that this was a point which the First-tier Tribunal was entitled to reach on the available evidence and which we cannot upset on perversity or irrationality grounds.

18. The next point relates to the delay in applying for settlement on this basis under the Rules because as we have already observed, under paragraph 40 of the determination, it is said that no credible explanation has been advanced as to why the appellant waited so long to make the application. It is now said or it may well have been said before the First-tier Tribunal that there is a straightforward explanation for this, namely that the appellant did not leave Eritrea for Sudan until 2012 and as we pointed out the refugee card was issued to her in May 2012. It simply was not possible to apply from Eritrea since there is no Embassy or Entry Clearance Office in Eritrea and frankly there is merit in that point and it may be, probably is in fact right to say that the decision is unduly harsh, arguably perverse on it but the difficulty is it is only one point amongst a mass of other credibility point and we simply cannot reach the conclusion that the whole decision falls to the grounds because an arguably irrational decision has been reached on one aspect of the case. The appellant has to face the reality that adverse credibility findings are made on a numerous series of bases and the point we have latched onto here is only one out of many. Although sympathetic with that ground of appeal it is not sufficient by itself unless there are other grounds which can succeed to bring the appellant home before us today.

19. The next point really goes back to a previous point. It is said by Ms Themistocleous that too much weight was put on the photographs and this reverts back to paragraph 40 of the determination and the fact that photographs were not provided at the time that the marriage certificate was furnished to the unknown person mentioned in paragraph 40. That I am afraid is a point which cannot get very far before this Tribunal, it is an issue of fact, it may be that too much weight was put on it but too much weight does not amount to a ground of appeal. It is within the margin of appreciation, it is within the fact-finding evaluation of the First-tier Tribunal and we are simply not prepared to interfere with it.

20. The seventh point relates to the e-mails and indeed that point comes up in a number of ways but the first way in which it comes up, and this is a point which actually appealed to a judge granting permission in this case, is the explanation given in paragraph 49 of the determination for not being able to obtain e-mails on the blocked account does not appear to be a particularly compelling explanation. The problem with all of this is that there is a perfectly simply way in which the point can be put against the appellant and it works like this, that even if the password had been forgotten or the account blocked, and we know that this was an account operated by Yahoo, it is a relatively straightforward process to unblock the account and a fresh password is provided on request to the username supplied in the first instance which of course is the e-mail address. Forgetting of passwords is not an insuperable

obstacle to the obtaining of re-entry to the account and copying of earlier e-mails which ere valuable evidence if they existed which could and should have been adduced to this First-tier Tribunal. In any event, as Mr Jack pointed out, that even if the sponsor's account was blocked there is no evidence that the appellant's account was blocked. So for slightly different reasons than those provided by the First-tier Tribunal there is nothing in that ground of appeal.

21. The other ground of appeal which relates to the e-mails is the conclusion set out in paragraph 47 of the determination ...to the two Yahoo e-mails which were provided namely those dated 16 June and 26 June 2012. The inference drawn from the scrutiny of those e-mails was that "I find the terms of these e-mails indicative of a desire to leave Sudan and enter the United Kingdom rather than indicative of a subsisting marriage". We have described earlier findings as on the harsh side and this finding, we think, falls into the same category but at the end of the day the inferences to be drawn from documentary material such as this were for the Tribunal, they are not for us and we are not prepared to say that the inferences drawn in paragraph 47 are perverse or irrational inferences.

22. The remaining points of appeal were not frankly the strongest, there is no mention of the telephone cards in the determination but the telephone cards would never have proved to whom, and from whom the calls were made. There was some evidence of telephone contact but that appears most of it at least to have been postdecision, all the Skype contact was postdecision. The conclusion reached in paragraph 49 was that any evidence of contact is of recent origin and largely postdated the refusal notice made on 11 November 2012. These were permissible findings and no error of law in our judgment was displayed or is displayed.

23. The conclusions on Article 8 are entirely parasitic as it were on the conclusions on the Rules and the claim under Article 8 could not succeed on an independent or freestanding basis. It is possible that with different and better evidence this claim could have succeeded before the First-tier Tribunal but on the available evidence this Tribunal in a reasonably careful decision reached a conclusion which was within acceptable parameters of decision-making, reasoning and fact-findings. Our conclusion is that this appeal must be dismissed.

Signed Date

Mr Justice Jay