Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/03371/2014**

THE IMMIGRATION ACTS

Heard at Phoenix House, Bradford	**Determination Promulgated**
On 17th August 2015	**On 30th December 2015**
And by video link at Field House	
On 14th December 2015	

Before

UPPER TRIBUNAL JUDGE SOUTHERN
UPPER TRIBUNAL JUDGE COKER

Between

G J
(Anonymity order made)

Appellant

and

ENTRY CLEARANCE OFFICER - Cyprus

Respondent

Representation:

For the Appellant: Mr M Syed, legal representative, The Taylor Partnership on 17th August 2015
For the Respondent: Ms S Petterson on17th August 2015 and by Mr M Diwnycz on 14th December 2015, Senior Home Office Presenting Officers

DECISION AND REASONS

1. The appellant sought, and was granted, permission to appeal a decision of First-tier Tribunal Judge Kelly dismissing an appeal by Ms J against a decision refusing her entry clearance as a 'pre-flight partner of a refugee' under paragraph 352AA of the Immigration Rules. Permission was also granted on the ground that the judge had failed to adequately consider Article 8 and that the judge had failed to adequately consider the application in accordance with paragraph 319O of the immigration Rules.

2. Before us on 17th August 2015 Mr Syed withdrew reliance on the appellant's grounds seeking permission to appeal the decision on Article 8 and under paragraph 319O of the Immigration Rules. The appeal before us was thus limited, on the grounds pleaded, to a challenge to the findings and conclusion of the judge in respect of the application under paragraph 352AA.

Background

3. Ms J, a Zimbabwean citizen studying in Cyprus at the date of the decision, is the unmarried partner of J M, also a Zimbabwean citizen, who is recognised as a refugee in the UK with leave to remain until 19th September 2017.

4. Judge Kelly made the following findings of fact which now stand unchallenged:

   (a) GJ, who we shall refer to as Ms J hereafter, had not, as alleged by the SSHD, used deception in a previous entry clearance application. Therefore her appeal against the mandatory refusal under paragraph 320(7B) Immigration Rules was allowed.
   (b) Ms J and Mr M entered into a customary marriage in South Africa in October 2007 and began to live together in November 2007. The couple cohabited in a relationship akin to marriage for a period in excess of two years between November 2007 and December 2009.
   (c) Mr M left Zimbabwe and moved to South Africa in December 2003; he travelled to the UK in June 2012 for an interview in the UK to join the British Army.
   (d) Neither Mr M nor Ms J were forced to flee South Africa whether for reasons of persecution or otherwise.
   (e) Ms J left South Africa in December 2009 and went to Cyprus to study.

5. The evidence upon which Mr M was recognised as a refugee was, according to the Statement of Evidence Form ("SEF") submitted in Ms J's appeal, that on arriving in the UK he had received telephone calls from his family who warned him that Zanu elements in South Africa and Zimbabwe were threatening to kill him because of his intention to join the British Army. He refers in his SEF to his intention, prior to hearing of those threats, to return back to live and work in South Africa.

Error of Law

6. Mr Syed relied upon AA (Marriage – country of Nationality) Somalia [2004] UKIAT 00031. He submitted, even though the evidence from his SEF was clearly to the contrary, that Mr M had fled South Africa because of a fear of persecution; that South Africa was his country of former habitual residence; and that because the couple were in a relationship akin to marriage for a period in excess of 2 years prior to Mr M fleeing South Africa, Ms J fell within paragraph 352AA(iii) because:

> " the relationship existed before the person granted asylum left the country of his former habitual residence in order to seek asylum"

7. AA considers the question of habitual residence and the House of Lords decision in Nessa v Chief Adjudication Officer [1999] UKHL 41. As was observed in AA [36]:

> "…In that case, whilst not coming to the conclusion that "ordinary residence" and "habitual residence" were synonymous, their Lordships found that there was a degree of overlap …..That expression connoted "residence in a place with some degree of continuity and apart from accidental or temporary absences."

8. Paragraph 352AA reads as follows:

> 352AA. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the unmarried or the same-sex partner of a refugee are that:
> (i) the applicant is the unmarried or same-sex partner of a person who is currently a refugee granted status as such under the immigration rules in the United Kingdom and was granted that status in the UK on or after 9th October 2006; and
> (ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and
> (iii) the relationship existed before the person granted asylum left the country of his 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 Geneva Convention if he were to seek asylum in his own right; and
> (v) each of the parties intends to live permanently with the other as his or her unmarried or same-sex partner and the relationship is subsisting; and
> (vi) the parties are not involved in a consanguineous relationship with one another; and
> (vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

9. Mr M had been resident in South Africa since December 2003. His evidence in his SEF was that he was living and working there and although he suggested that he may not have had a residence permit he did not assert that he was living there unlawfully or that he was at risk of removal or deportation to Zimbabwe. He and Ms J had cohabited there for two years and there was no indication that they had had any problems from the authorities. Judge Kelly found that the reference to 'habitual residence in paragraph 352AA referred to and was defined by the Refugee Convention and was a term of art applied where appropriate to stateless individuals'.

10. We do not agree. In the context of paragraph 352AA the term habitual residence is a term which is to be interpreted in accordance with the normal use and meaning of the words and this means, as explained in Nessa, "residence in a place with some degree of continuity and apart from accidental or temporary absences". For these reasons we are satisfied that the First-tier Tribunal judge erred in law in finding that Mr M was not habitually resident in South Africa. We are reinforced in that conclusion by the finding in AA that the appellant in that appeal, a Somali national, had lived in Ethiopia for some three years prior to leaving Ethiopia to claim asylum in the UK and had been found to have been habitually resident in Ethiopia. We are also aware that the origin of the Rule lies in the Final Act of the United Nations Conference on the Status of Refugees and Stateless Persons. As referred to in AA [19]

> "[19]…As set out in Annex I of the UNHCR Handbook, the Conference, considering that the family was "the natural and fundamental group of society" and that unity of the family was "an essential right of the refugee" recommended that Governments…take the necessary measures for the protection of a refugee's family, especially with a view to …

> ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country".
> [20] Prior to the coming into force of paragraph 352A…..the Government of the United Kingdom had sought to give effect to the recommendation of the Conference by means of policy statements."

11. Mr M did not however flee South Africa to claim asylum in the UK. He left South Africa with the intention of returning there, after his interview to join the British Army had taken place in the UK. It is therefore plain that Ms J does not meet 352AA(iii) – Mr M did not leave the country of his former habitual residence in order to seek asylum (our emphasis). [39] of AA reinforces that interpretation of 352AA(iii) (albeit in an earlier version of the rule) because the sponsor in that case left Ethiopia "in order to seek asylum".

12. Paragraph 352AA exists to enable family reunion for families fractured because circumstances have occurred which have caused a person to flee persecution, leaving close family members behind. The Rule requires the fracture in the family to have been as a direct result of the persecution, not because of some event in the future which subsequently led to that disturbance in family relations.

13. In consequence therefore Judge Kelly arrived at the correct conclusion but for the wrong reasons. He dismissed the appeal on the basis that the sponsor had not been habitually resident in South Africa and the couple had not cohabited in Zimbabwe; whereas on the proper interpretation of the Rule, the appeal fell to be dismissed on the basis that the appellant simply did not meet the requirements of the paragraph 352AA. Thus, although the judge made an error of law, as the outcome, for different reasons, was bound to be the same, his error was not a material one.

14. That however is not a complete answer to this appeal.

15. Although it was effectively conceded by Mr Syed that Ms J could not succeed in her appeal under the Rules, the First-tier tribunal judge had not considered whether there was a policy of the respondent that might benefit her. The Tribunal invited submissions from both parties as to whether the position of refugees *sur place* was adequately accommodated by the framework of the immigration rules and if not whether there was a relevant published policy to deal with the apparent lacuna in the rules. The rules do not, on their face, appear to make any provision for spouses or partners of *sur place* refugees. There is no reason immediately apparent why the spouses/partners of those entitled to be recognised as refugees on the basis of a *sur place* claim should be treated less favourably than those whose need to flee persecution to seek international protection arose while still in their country of nationality.

16. When asked by the Tribunal if there was such a policy Mr Syed said he thought there was but didn't know what it said. It is regrettable that a legal representative seeks to argue a case not only by attempting to make submissions that did not form part of the sponsor's evidence as a consequence of which he was recognised as a refugee but also by failing to research adequately and present his client's case both before the First-tier Tribunal and in seeking permission to appeal. Although not pleaded, we were concerned to establish the correct

position and adjourned for a short time to enable Ms Petterson to see if she could establish whether there was a relevant policy. Ms Petterson, quite properly, raised no objection to the Tribunal pursuing this line of enquiry and herself tried to identify the relevant policy but was unable, given the resources available to her, to do so.

17. Fortunately, the Tribunal itself was able to obtain a copy of the respondent's policy: the Asylum Policy and Visas and Immigration Operational Guidance/Asylum Instructions on how UK Visas and Immigration makes decisions about asylum/Family Reunion which states – to the extent relevant:

> 2.2 Family reunion entitlements (leave not status)
> Successful family reunion applicants will be granted leave in line with the sponsor but they will not be granted status in line as they themselves are not necessarily recognised as refugees. This leave will be granted to expire at the same time as the sponsor's leave expires. If the sponsor has indefinite leave to remain (ILR), the successful applicant will be granted ILR in line.
> ….
>
> 2.4 Refugees sur place
> A "refugee sur place" is someone who falls within the Convention definition of a refugee some time after they left their home country or place of habitual residence. For instance, a person already outside their country of origin when a change of circumstances occurs in their home country which gives rise to a well-founded fear of persecution for a Convention reason.
> Individuals who are granted refugee status or humanitarian protection on sur place grounds are eligible for family reunion. For such individuals, as long as the family unit was formed before the claim of asylum, it will be treated as 'pre-flight'.

18. The policy enables the respondent to consider a family reunion application where the sponsor is a *sur place* refugee in accordance with the requirements of paragraph 352AA of the Immigration Rules - see paragraph 8 above.

19. Consideration in all *sur place* cases should be given to whether the requirements of the Rules are met (save for the last clause of 352AA(iii) – leaving *in order to seek asylum).* The fact that a person is the unmarried or same-sex partner of a *sur place* refugee (or indeed the spouse or civil partner who would be covered by the policy and have to meet rule 352A) does not, of itself, result in the grant of entry clearance or leave to remain. In the case of *sur place* refugees this would include consideration of the reasons, circumstances and intentions resulting in the separation of the family when and after the sponsoring refugee left his/her country of former habitual residence and thus whether the family unit meets the requirements of 352AA(v) (or 352A(iv)).

20. Where the policy has not been considered and consideration has not been given to <u>all</u> the requirements of paragraph 352AA (or 352A) the Tribunal will have to be satisfied whether or not the appellant meets the requirements of paragraph 322AA (or 322A). There is no discretion imported into the policy or the Rule and thus this is not a case where <u>AG and others (Policies; executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082</u> applies.

21. In so far as Ms J is concerned, it is plain from Mr M's SEF evidence, as accepted by the respondent because he was recognised as a refugee, that he was a refugee *sur place.* Judge Kelly was not provided with a copy of the

relevant policy and it appears the appellant's appeal was argued on a basis that could not, given that Mr M is a *sur place* refugee, succeed. Nevertheless there is no indication that Ms J's application was considered by the Entry Clearance Officer in accordance with the respondent's published policy. The decision to refuse her entry clearance is not sustainable because a decision that is taken without an applicable policy being taken into account is an unlawful one. Accordingly we are satisfied that, when the decision of Judge Kelly is considered as a whole, it is plain that his decision to dismiss the appeal discloses material legal error. Of course the appeal before us was brought under the Nationality, Immigration and Asylum Act 2002 before it was amended by the Immigration Act 2014.

22. In summary therefore, the Immigration Rules provide only for family reunion of a pre-flight spouse/partner of a refugee, not of a *sur place* refugee. The Rules cannot be 'read down' to accommodate family reunion for *sur place* refugees. The respondent's policy enables the wide variety of circumstances that may result in a person being recognised as a refugee *sur place* to be considered by the respondent in reaching her decision. The Tribunal is required, in determining an appeal, to take account of a relevant policy.

23. We therefore set aside the decision of Judge Kelly and will remake the decision. We sent out various directions and on 14th December the matter was listed for hearing of oral evidence and submissions.

REMADE DECISION ON 14th DECEMBER 2015

24. On 14th December 2015 the appellant was not legally represented and we heard from the sponsor on her behalf and Mr Diwnycz via video link. Mr M had filed a further witness statement, as previously directed in which he confirmed the level of contact claimed between him and Ms M and the birth of their baby on 16th February 2015. Also filed was a copy of the baby's birth certificate naming MR M as the father and copies of pages from his passport showing a number of visits to Cyprus since he obtained his travel document in June 2013.

25. As we said at the hearing on 17th August 2015, the findings of fact set out in paragraph 4 above are preserved.

26. We indicated to both parties that our view was that the appeal should be allowed as not in accordance with the law given the failure of the respondent Entry Clearance Officer to take a decision taking account of the policy referred to above in paragraph 17.

27. We discussed with the parties whether we should hear evidence with regard to the subsistence of the relationship and the intention of the parties to live together. Given the age of the decision the subject of the appeal and the birth of the baby we suggested that it may well be more appropriate for the respondent Entry Clearance Officer to consider the subsistence of the relationship and the couple's intentions (together with the preserved findings) when considering the application in accordance with the policy rather than for us to reach a decision on the rather sparse evidence before us as to a situation which is, it appears, so

different to the current situation. The Entry Clearance Officer will be in a better position than us to consider the evidence as it is now in this particular case and will in any event have to take a fresh decision.

28. Both parties agreed to this course of action.

29. Accordingly we allow the appeal on the basis that this was a decision made not in accordance with the law.

Conclusion

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

31. We set aside the decision of the First-tier Tribunal.

32. We re-make the decision in the appeal by allowing the appeal, the decision of the Entry Clearance Officer having been not in accordance with the law.

Date 16th December 2015

Upper Tribunal Judge Coker