IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/12293/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 24th August 2015	**On 8th September 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

TESFIT BOCHRATSEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss A Faryl, Counsel instructed on behalf of Beachwood Solicitors
For the Respondent: Ms R Petterson, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, with permission appeals against the decision of the First-tier Tribunal (Judge Myers) who, in a determination promulgated on 10th April 2015 dismissed the Appellant's appeal against the decision of the Entry Clearance Officer to refuse his application for leave to enter the United Kingdom under paragraph 352AA of the Immigration Rules as the unmarried partner of a refugee.

2. The Appellant is a citizen of Eritrea born on 1st January 1984. He was sponsored by Feven Berhane, who was granted refugee status in 2014. The decision of the First-tier Tribunal set out the application made under paragraph 352AA of the Immigration Rules the application being made on 28th July 2014. The application referred to spouse/partner at part 3 in family details noting that his marital status was as an "unmarried partner" and at part 6 he gave the Sponsor's details. At part 8 relating to additional information where the Appellant is able to set out any other information to be considered as part of the application the following was recorded:-

> "Yes I wish to arrive in UK meet my wife as soon as possible. Thank you."

There was no evidence accompanying the application in support of the relevant Immigration Rule which required at 352AA(ii) that 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. There was a letter accompanying the application dated 20th June 2014 made by the Appellant's former solicitors but no reference was made in that document to them living together but stated that they met in 2006 through family and that their engagement had taken place in 2007. The letter makes reference to "our client's partner fled Eritrea in 2009 due to fear of his life and since then our client has not seen him and was not aware of his whereabouts until recently." This must refer to the Sponsor and not the Appellant. A statutory declaration was provided by the Sponsor which again made reference to her having a partner before she left Eritrea and having met him in 2006 and got engaged in 2007. She refers to him fleeing the country in 2009 and she had not seen him since that date. There is no reference to the relationship that took place between them in Eritrea and significantly details of any life they had together.

3. The Entry Clearance Officer in a decision made on 11th September 2014 was that the application was refused as the Entry Clearance Officer was not satisfied that the Appellant had lived with his Sponsor in a relationship akin to marriage which had subsisted for two years or more. This was based on the evidence set out in the preceding paragraph namely that the letter submitted on his behalf stated that he had met his Sponsor in 2006 and had got engaged in 2007; he left Eritrea in 2009 and his Sponsor had not been aware of his whereabouts until recently. That there had been no evidence in support of the claim of living together which was relevant to the requirement in the Rule. Following the refusal, Grounds of Appeal had been lodged in which it was stated that he had moved in with the Sponsor in January 2007. However the Entry Clearance Manager, reviewing the evidence noted that notwithstanding that claim made there was no evidence in support of it and the only evidence provided was that from 2014 and was un-translated.

4. The Appellant lodged an appeal against that decision and it came before the First-tier Tribunal (Judge Myers) on 30th March 2015 at Bradford. In a determination promulgated on 10th April 2015, the judge having the opportunity of hearing the oral evidence of the Sponsor, dismissed the appeal under the Immigration Rules and on human rights grounds. The findings of fact are set out at paragraphs [11 to 16] in which the judge reached the conclusion that the Sponsor's evidence lacked credibility and that whilst the judge found that she was engaged to the Appellant before he and

the Sponsor left Eritrea, and also they had re-established contact, the judge did not find on the evidence that they could meet the Immigration Rules because the Appellant had failed to discharge the burden upon him to demonstrate that they had lived together in a relationship akin to marriage for a period of two years or more before leaving Eritrea. The judge reached a finding at [16] that the evidence that they did live together was fabricated after it became apparent that they did not meet the requirements of the Rules. The findings make reference to the evidence that was before the Tribunal and why the judge had reached that decision.

5. As to Article 8, it had not been raised in the Grounds of Appeal however, the judge considered that issue at paragraphs [17 to 20] and having found that whilst the couple were engaged before they left Eritrea they had never actually lived together. They had not seen each other since 2009 and only recently re-established contact. The judge concluded on the evidence that they were unlikely to have spent much time together, he was not the father of the Sponsor's child and found on the evidence that this was a relationship that was tenuous in nature and not longstanding. At paragraph [19] the judge considered it in the alternative that the decision was not disproportionate taking into account the Section 117 of the 2014 Act and that there was no evidence to support the submission that whilst the Sponsor was a refugee arising out of her circumstances in Eritrea, that she was not unable to join the Appellant in Israel or for the Appellant to make an application for entry clearance as a partner in accordance with the Immigration Rules.

6. The Appellant sought permission to appeal that decision and permission was granted by Judge Landes on 6th July 2015.

7. Thus the appeal came before the Upper Tribunal. Miss Faryl relied upon the written grounds that had been submitted on the Appellant's behalf. As to Ground 1, and she submitted that the judge had accepted that the parties were engaged but had rejected the Sponsor's oral evidence of having lived together. She accepted that there was no documentary evidence in support of their relationship. She further accepted that the letter referred to by the judge which was a covering letter but did not make reference to them living together or any circumstances in that regard and further, it was accepted that the statutory declaration that the judge referred to in the findings of fact also make no mention of them living together. However, she submitted the letter was merely a covering letter and not intended to set out the Appellant's case in detail and furthermore, there was no requirement to set out the claim in its entirety in a statutory declaration. She submitted that it was only after the application was refused that the focus turned to the lack of evidence of living together. She further reminded the Tribunal that it was notable that there was no documentary evidence that the parties had become engaged in January 2007 but the judge accepted that evidence but rejected her evidence of about having lived with the Appellant. In this regard she further submitted that the Sponsor was found to be credible by the Secretary of State and being granted asylum without the application being refused or being required to attend before the First-tier Tribunal.

8. As to Ground 2 she referred the Tribunal to paragraph [12] of the judge's determination and in particular the inconsistency as to when documents linking the Appellant and the Sponsor had been burned and by whom. Ms Faryl read from her own notes of the hearing as to what the Appellant had said and paragraph 13 of her statement was clarified to the extent that it made reference to a letter of confirmation of engagement that had been burned. The grounds also make reference to the Sponsor explaining in her evidence that the statement was drafted without the benefit of a Tigrinyan interpreter. She submitted that it was a "red herring" and that it was immaterial as to who burned the documents and when the documents were burned and that the judge should not have given weight to that matter which was essentially a red herring and was immaterial to the issue.

9. As to Ground 3 it was asserted that the judge had made an erroneous factual finding in that the judge found there was an inconsistency in the Sponsor's evidence by reference to the interview in which she had said she was doing military service and this was inconsistent with her evidence that she was living with the Appellant. However, questions 31 to 33 of the asylum interview demonstrated that she was living at the family house and therefore she could have been undertaking military service and living with the Appellant.

10. In her concluding comments, Miss Faryl submitted that the judge had erred in her approach to the Sponsor's evidence. In the asylum interview she disclosed that she was engaged to be married and her general credibility was accepted. Consequently the determination was unsafe and should be set aside.

11. Ms Peterson on behalf of the Respondent relied upon the Rule 24 response and that the judge properly considered the evidence and it was open to the judge to make those findings of fact on the evidence that was before her or in real terms the lack of evidence that was before the judge. The Appellant had never previously claimed to have lived in a relationship akin to marriage and there was no adequate supporting evidence of such a relationship. Thus it was open to the judge to conclude that the Appellant had not discharged the burden of proof. The asylum interview had referred to their engagement but did not provide any cogent evidence that the Sponsor was living with the Appellant at the time or thereafter. In her oral submissions, Ms Peterson submitted that the first ground was not made out and that there was no evidence that they had lived together and it was open to the judge to reject her evidence for the reasons that were given. Whilst the judge made reference to her military service, careful consideration of the answers at questions 31 to 32 lends no support to her claim that they were living together at the family home. Consequently she invited the Tribunal to uphold the determination.

Conclusions:

12. The grounds seek to assert that it was wrong of the judge to rely on the lack of evidence in the statutory declaration and a letter written by the Appellant's former solicitors because there was no requirement to set out the claim in the statutory declaration and that the letter was simply an accompanying letter which was in effect

an "introduction" and thus the judge's findings were wrong in that respect. I do not accept that submission. The judge at [11] gave proper consideration to the evidence or rather the lack of evidence which was central to the sole issue to be determined. It is accepted on behalf of the Appellant the letter which accompanied the application made no reference whatsoever to the parties having lived together. The letter dated 20th June 2014 refers to the meeting in 2006 and having got engaged in 2007. No reference is made to the circumstances of any relationship between that period.

13. It is also accepted that the contents of the statutory declaration did not make any reference to them living together.

14. In my judgment it was entirely open to the judge to find that those documents which had been sent to the Respondent for the purposes of the application, failed to evidence the material aspects of her claim that the parties had lived together in Eritrea and that it was only after the refusal in which it was made plain, that there was no evidence to support the Immigration Rules and them having lived together that the Grounds of Appeal were served in which it was mentioned for the first time that they had indeed lived together. It is also not the case that the covering letter (at page 96 of the bundle) was a document properly described as an introduction. I do not find the submission made by Miss Faryl in this respect is borne out by a consideration of the document itself. It is not a short document, it consists of two pages setting out the Appellant's circumstances and there is a paragraph in the letter that makes specific reference to the Appellant. It describes the Sponsor having a partner whom she met in 2006 through family and that the engagement took place in 2007. The paragraph went on to mention further details. Following that there were two further paragraphs dealing with the relationship but at no time does it make reference to them living together at any stage.

15. Furthermore, the statutory declaration which was sent for the purposes of supporting the application which was made on behalf of the Sponsor and her factual circumstances and that of the Appellant, make no reference to them living together. This is accepted on behalf of the appellant. These are documents which the judge was entitled to view as documents in which it was reasonable to expect there to have been some reference to the nature of the relationship and living together which was the central issue of the application. The evidence was wholly lacking and in those circumstances the judge's finding at [11] was open to the judge to make and that an adverse inference that was drawn from the lack of evidence in this regard undermined their claim to have lived together.

16. The further grounds also have no merit in my judgment. At paragraph [12] the judge makes reference to evidence given before the Tribunal (both written and documentary) in which the Appellant purported to give an explanation as to why there was a dearth of documentary evidence to support the relationship. The judge makes reference at [12] to the contents of the statutory declaration. The judge also made a reference to the witness statement at paragraph 13 which was in the bundle in which she stated:-

> "I had a lot of evidence of my relationship with Tesfit such as photographs and evidence of us living together but due to myself fleeing the country, I was informed later on by my family that the government is looking for me and my family burned the documentary evidence which connected Tesfit and I."

Furthermore, in the Grounds of Appeal provided on behalf of the Appellant at page 3 it was referred to the Appellant meeting the Sponsor in the middle of 2006 and after a couple of months into their relationship they both moved in together and got engaged in January 2007 with the consent of the parents. I pause to observe that there was no evidence from the parents having given their consent to the engagement and would have been in a position to support their claim of living together. The explanation given in the Grounds of Appeal about evidence in support is relevant. The Grounds of Appeal make reference to the Sponsor:-

> "The Sponsor had much of the evidence of the relationship in terms of photographs and living together but due to the Sponsor fleeing the country in 2012 she was informed later on by her family that the government is looking for her; her family then burned the documentary evidence which connected them to her."

Thus in those documents the evidence was consistent as to the Sponsor having documentary evidence of the relationship and living together but that it was burned by her family after she had left. The explanation however does not explain why the Appellant had no evidence himself as to them living together. The statutory declaration repeats paragraph 13 of the witness statement. The grounds are advanced on the basis of what the judge recorded at paragraph [12] relating to cross-examination of the Sponsor in which it was said that she (my emphasis) had burned the documents while still living in the family home to prevent the authorities linking her to him. As the judge noted this was inconsistent with the evidence given in her witness statement and the Grounds of Appeal, that she had been informed that her family had burned the documents. Miss Faryl sought to rely on her notes taken during the hearing (they had not been provided to the Presenting Officer or the Tribunal prior to this hearing). She stated that the Appellant was asked about paragraph 13 of the witness statement and that the evidence that was burned was not of them living together but destroyed evidence of them being engaged. The Record of Proceedings in the file made reference to the Sponsor's evidence given in cross-examination namely that –

> "When we got engaged there was a letter of confirmation of the engagement signed by both parents and there were photos which were burnt because the soldiers were looking for him."

She reiterated that she had burnt the documents.

17. Whilst Ms Faryl submits that the evidence was that she had burnt the documents herself and they related to the engagement and therefore it was a "red herring" that does not in my judgment negate the finding made by the judge. The judge had evidence from two separate sources which specifically referred to the evidence of photographs and evidence of them living together (not simply the engagement) (see paragraph 13 of the witness statement and the Grounds of Appeal) in which both

refer to evidence of the relationship and living together. In the explanation as to why she had no evidence of the relationship it was said by her that her family had burned the evidence after she had left. The judge was entitled to consider that this was inconsistent with the evidence given in cross-examination which was that she had burned the evidence. Whilst Miss Faryl submits that she had clarified this as evidence of engagement and not living together, that does not explain the inconsistency that she has specifically referred to the family burning evidence of the relationship and not just evidence as to the engagement.

18. Furthermore, the judge at [13] was entitled to reject her explanation for the inconsistency which was that this was the first time she had given evidence in Tigrinyan and that she had been able to expand her answers. However, the judge gave adequate and sustainable reasons for rejecting her account observing that she had made a statutory declaration for the Appellant's application, she had adopted her witness statement in evidence-in-chief and had signed the declaration on the statement to confirm it was true and the contents had been read to her. The judge referred to the evidence given that she had read the documents herself but because she was able to speak English and read a little English but only mentioned what she considered to be the most important things in the witness statement. The judge rejected that explanation noting that she had had several opportunities to make amendments and corrections to her witness statement and it was clear from the contents that she was able to make herself understood. The judge noted "It beggars belief that her solicitor would record in her statement that her family destroyed the documents after she left Eritrea if these were not her instructions." The judge also found that it –

> "... beggar's belief that she would admit to include in her statement that she destroyed some of the documents while still living at the Appellant's family home because she did not think this was important."

Thus it was not simply a matter of when and whom burnt the documents but the reasons given for doing such. Those findings were open to the judge when reaching a decision on the credibility of the Sponsor and ultimately the Appellant's claim.

19. The judge gave further reasons for rejecting her evidence at [14]. As the judge recorded, it had been submitted on her behalf that the Asylum Interview Record at questions 57 to 69, that she gave details about the Appellant and the details had not been included in the answers to earlier questions about marital status and the spouse/partner details and therefore, it was submitted that the interview record was incomplete on the basis that the record must have omitted some of the answers. The judge was wholly entitled to reject that account. As the judge found, the fact that the Appellant's details were not included in the questions about marital status and the spouse's details is consistent with the Sponsor having said she was not married but engaged. The answers recorded at questions 57 to 69 of the asylum interview make no reference to the Appellant living with the Sponsor whatsoever and the judge was entitled to reach the conclusion that it was not the case as submitted that the questions from the interview record were missing or that the record was incomplete.

20. Miss Faryl submitted that the second part of the findings at [14] were factually incorrect (Ground 3). In this regard she submitted that the judge erroneously found that there was discrepancy by considering the answers at questions 15 to 19 of the interview. Those answers set out that she did military service between 2006 and 2008 and then from 2008 to 2012 when she was housed at a military base called Betigrish where she did secretarial work. The judge found that was inconsistent with her evidence that she had lived with the Appellant at the family home between 2006 to 2008. Miss Faryl directed the Tribunal to questions 31 to 33 of the asylum interview where the Sponsor was asked if, she was serving at the military base, how did she get to Asmara to meet the agent?. The reply given by the Sponsor in those questions was that she had worked at the base during the day and had returned home to sleep at night which was a 50 minutes' drive away.

21. Whilst Miss Faryl is right that in the later answer the Sponsor did clarify that she was able to sleep at the family home and on the face of it demonstrates that the judge's finding in this respect was not entirely correct, the answer itself does not give support for the Sponsor's account that she was living with the Appellant at that time. Nowhere within the interview questions either at questions 31 to 33 or before that does the Sponsor refer to living at the family home with anyone other than her close family members and there is no reference to her living there with the Appellant or a fiancé.

22. Considering the judge's findings in the round, the judge was entitled to reach the conclusion that on the evidence before the Tribunal, the Appellant had failed to discharge the burden on him that he and the Sponsor had demonstrated that the Appellant met the Immigration Rules and that they were living together as required by paragraph 352AA. The burden lay on the Appellant and the judge gave adequate and sustainable reasons for reaching the conclusion that the Sponsor and the Appellant's evidence had not discharged that burden on the balance of probabilities. Whilst Miss Faryl submits that the Sponsor had been found credible in her asylum claim and therefore the judge should have accepted her oral evidence even though there was no other evidence in support (either from her or from the Appellant himself), that ignores the fact that the judge had the opportunity of hearing the Sponsor give oral evidence and for it to be the subject of cross-examination.

23. In this context I remind myself of the decision in **Piglowska v Piglowska [1999] UKHL 27** where Lord Hoffmann said:-

> "The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts ..."

There is also a quotation from his decision in **Biogen Inc v Medeva Limited [1997] RPC1**:-

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete

> statement of the impression which has been made upon him by the primary evidence. His express findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance ... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

24. The judge was best placed to consider the credibility of the Sponsor but for the reasons given, she found it to lack credibility and rejected the account that they had lived together. The judge was entitled to reach the conclusion that they were engaged but that was not an unconditional acceptance as the grounds assert but was a finding made by the judge because she was satisfied that that was the only fact that the sponsor had been consistent about. Consequently the grounds are not made out and do not demonstrate any arguable error of law in the judge's determination. The findings of fact were open to the judge to make on the evidence for the reasons given above.

25. As to Article 8, the grounds submit that the judge erred in her approach to the evaluation of Article 8 on the basis that it was necessarily informed by her earlier adverse credibility findings. As a result of the decision above namely that the judge was entitled to reach those adverse credibility findings, it has not been demonstrated that her approach to Article 8 was thereby flawed or in error. Consequently the decision of the First-tier Tribunal does not disclose any error of law and therefore the decision shall stand.

Notice of Decision

The decision of the First-tier Tribunal does not disclose any error of law and the decision shall stand.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Reeds