



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/09342/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre
On 11th June 2018

Determination & Reasons Promulgated
On 12th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

RANIA ISMAIL AHMED OSMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Holmes (Solicitor), Broudie Jackson & Canter
For the Respondent: Ms H Aboni (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Pickup, promulgated on 25th August 2017, following a hearing at Bradford on 28th July 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a female, a citizen of Sudan, who was born on 20th March 1987. She appealed against the decision of the Respondent dated 17th December 2015, to refuse her application under paragraph 352A to join her UK based spouse, Mr M O, who had been granted refugee asylum status on 11th June 2014.

The Appellant's Claim

3. The essence of the Appellant's claim is that in 2009, her sponsoring husband, Mr M O, fled Sudan to go and live in Israel, which he did for the next five years until 14th December 2013. Whilst living in Israel, he married the Appellant by proxy, in accordance with Sudanese law, and this marriage took place on 14th December 2012, three years after the Sponsor had fled Sudan to go and live in Israel. The Appellant continued to be living in Sudan. In Israel itself, the Appellant's husband, M O, had made an application for refugee asylum status, which was still pending, but he had been granted a "conditional release".
4. The position in Israel for the recipients of the status was that, "Israel does not attach any rights, including the right to work or social benefits, to conditional release permits, and it is accepted that such permits are of short duration and are renewed regularly". In effect, the Appellant simply had temporary admission to remain in Israel.
5. The issue before the authorities was whether, the Appellant having married her sponsoring husband, in what was regarded to be a genuine and subsisting marriage, could demonstrate that the marriage had taken place in accordance with the laws of the country in which the Appellant was "habitually resident". The application for entry clearance to join the sponsoring husband, made by the Appellant, was rejected on the basis that her husband was not habitually resident in Israel, because he was simply living there on the basis of a "conditional release" permit. However, he was not "habitually resident" in Sudan either, a country which he had left five years ago.

The Judge's Findings

6. The judge held that, although there was a marriage certificate in this case, it had to be issued by a competent authority, and the one produced by the Appellant did not raise the presumption of marriage, because it did not emanate from an authority with legal power to create or confirm the facts to which it attested.
7. The judge went on to say that,

"I am satisfied that the Entry Clearance Officer raised doubts as to the validity of the marriage, putting the Appellant on notice. Despite consideration of the documents, I remain unsatisfied that the Appellant has demonstrated that the marriage was valid in Sudan or Israel" (paragraph 25).
8. The appeal was dismissed.

The Grant of Permission

9. Application for permission to appeal to the Upper Tribunal was made on the basis that the Appellant was married to a "pre-flight" spouse, who had been accepted as a refugee in the UK, and that the judge had treated "lawful residence" as being a prerequisite for an individual before that individual could establish "habitual residence" in a country. This was not so. The refusal letter did not take issue with the fact that the relationship was subsisting as claimed. There was no cross-examination

and the Sponsor's evidence was agreed. Moreover, Judge Pickup had offered the Respondent Entry Clearance Officer's representative an adjournment, when it transpired that the basis of the refusal was misconceived, but when the Appellant asked for an adjournment, this was refused on the basis that the hearing had now progressed beyond a stage appropriate for an adjournment, and this was unfair.

10. In granting permission on 16th April 2018 the Upper Tribunal observed that it was at least arguable that the judge unfairly refused an adjournment request when the Respondent raised a new emphasis regarding the validity of the marriage "which was not identified in the decision letter". Moreover, it was at least arguable that "habitual residence" does not necessarily equate to lawful residence.
11. Finally, it was also arguable that "the judge went behind an undisputed issue relating to the genuine and subsisting nature of the relationship without giving the Appellant a fair opportunity to make submissions" (paragraph 4).

Submissions

12. At the hearing before me on 11th June 2018, Mr Holmes, appearing on behalf of the Appellant, referred to two bundles before the First-tier Tribunal, together with a supplementary bundle to the Upper Tribunal dated 1st June 2018. There was also a Rule 15 application before this Tribunal, which related to evidence which the Appellant's representatives wished to bring before the Tribunal, had an adjournment been granted, namely, on the question of the Appellant and the Sponsor were properly married under the laws of Sudan. Subject to this, Mr Holmes commenced with his detailed submissions before me.
13. First, he submitted that the judge was wrong to refuse an adjournment to the Appellant. The refusal letter had raised an issue in relation to the validity of the marriage under the laws of Israel. However, that was not the country of the celebration of the marriage. When the judge pointed this out to the Presenting Officer on the day of the hearing, he also offered an adjournment to the Respondent. The Presenting Officer left the courtroom to make a telephone call and returned to say that the Respondent would not adapt the Grounds of Refusal to the reality of the situation and would persist with the refusal as it stood. When, however, the Appellant's side made an application for an adjournment on the basis that they could show that the marriage was relevant in accordance with the laws of the country of celebration, namely, Sudan, this application was wrongly refused.
14. Second, in granting permission, the Upper Tribunal had stated that the concept of "habitual residence" was differently stated in the Refugee Convention, which refers to a person "outside the country of his former habitual residence" and the concept in paragraph 352A of the Immigration Rules, which refers to "former habitual residence". The Upper Tribunal had stated that, it was at least arguable that "habitual residence" did not necessarily equate to "lawful residence" and that "insofar as this ground could give rise to a useful analysis of the law that might be applicable to other cases, it merits further consideration at a hearing" (paragraph 3).

15. However, the Upper Tribunal had already addressed this question in the case of **AA (marriage – country of nationality) Somalia [2004] UKIAT 00031**, which involved two individuals, who had no lawful residence in Ethiopia, and that the established authorities made it clear that, “an appreciable period’ of residence, such as to establish habitual residence, may be as short as a month (see MacDonald’s Immigration Law and Practice, fifth edition, paras 5.14 and 13.21)” (at paragraph 36).
16. In that case the Tribunal had found that the Sponsor was habitually resident in Ethiopia, even though “she left that country in 2000, in order to seek asylum in the United Kingdom” and she was in July 2000 granted that status (paragraph 39). In that case the Sponsor had never sought and obtained from the Ethiopian Government the formal recognition of herself as a refugee, and she had fled the difficulties she faced in Somalia, by moving to Ethiopia, where she had stayed with a family who were known to her (paragraph 32), and yet the court had found that she had habitual residence in Ethiopia.
17. The Tribunal in that case had also drawn attention to how the established cases, in the House of Lords, had made a distinction between “ordinarily residence” and “habitual residence”, with the former being stricter than the latter because “ordinarily resident” refers to a man’s abode in a particular place or country which he has adopted voluntarily for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration” (paragraph 36 of **AA (Somalia)**).
18. Mr Holmes submitted that all of this was before Judge Pickup but it had not been taken on board. In fact, (at paragraph 32) Judge Pickup expressly referred to the fact that the definition of ordinarily resident and habitually resident overlap, and then referred to exactly the quotation just referred to in relation to “ordinarily resident”, that had been given by Mr Holmes.
19. However, what the judge had done was to conflate the concept of “ordinarily resident” with that of “habitual resident”. That was unwarranted because **AA (Somalia)** had made it clear that,

“In many cases, the country of a person’s former habitual residence, which he or she leaves in order to seek asylum, will be the country in which the person granted asylum in the United Kingdom, has a well-founded fear of persecution. If, however, the drafter of paragraph 352 had intended the reference to such a country in sub-paragraph (ii) to be so confined, it would have been an easy matter to have said so” (paragraph 34).

Mr Holmes submitted that plainly what the Upper Tribunal had said in granting permission in this case had already been expressly considered by the Tribunal in 2004 in **AA (Somalia)** so that the definition of the Refugee Convention was deliberately left separate from that which went beyond that of “former habitual residence” as so understood.

20. Third, and in any event, the Sponsor did have “lawful residence” in Israel because he was the recipient of a “conditional release” permit, and although this was not for refugee status (because one does not even know whether the refugee claim was being

processed, or about to be granted, or even properly made) the fact was that the Appellant had been granted a permit which had to be regularly renewed, which gave him legal status.

21. Finally, there was the question of the validity of the marriage in Sudan. It was difficult to see why the marriage certificates issued were not by a competent authority in accordance with the laws of Sudan. This was because the translation that appears (at page 27) refers to the fact that the marriage between the Appellant and the Sponsor took place, and that there were two witnesses to the marriage, and that a dowry had been agreed, and paid in advance, and this had been signed off by the chief registrar of the Sudanese judiciary, and it was subject to “authentication of Sudan Ministry of Foreign Affairs dated 13th July 2014”. Furthermore, there was a translation (at page 29) which referred to a “marriage document”, issued by the Republic of Sudan, by the judiciary, and entered into “Sharia court book number 12”, which referred to the fact that “this is a legitimate marriage, conducted in accordance with the provisions of the Islamic Sharia with due consent and acceptance of the contracting parties ...”, and referred to two witnesses who were present, with two copies being issued. The signatures were those of “the husband’s proxy” and of “the wife’s guardian”, and signed off by the court supervisor.
22. Finally, insofar as the Rule 15(2A), of the Upper Tribunal Rules, application was concerned, Mr Holmes drew attention to two essential documents. First, a document from the University of Khartoum, relating to the Islamic Jurisprudence Academy, to confirm the validity of the proxy marriage, together with the translations; and second, an affidavit to confirm that the Appellant was married to the Sponsor. Mr Holmes submitted that, in accordance with the letter from his instructing solicitors dated 30th May 2018 to the Upper Tribunal, these documents were not previously available and the question of the validity of the marriage in Sudan was not raised in the refusal letter, so such documents were not previously considered to be necessary, but had to be now submitted by way of this Rule 15(2A) application.
23. Mr Holmes also referred to a loose-leaf witness statement of the Sponsor dated 7th June 2017, consisting of one page, which was before the ECO, and had not been challenged. Indeed, if one looks at paragraphs 11 to 12 of the determination, it is clear that, when the Sponsor adopted the witness statement of 7th June 2017, as his evidence-in-chief, he was not cross-examined, and the judge observes that, “it follows that the Secretary of State accepts that the Sponsor met the Appellant when and in circumstances claimed and that they went through a form of proxy marriage in 2012” (paragraph 11).
24. For her part, Ms Aboni relied upon the Rule 24 response. She submitted that the validity of the marriage was the primary issue. The burden has always been on the Appellant to show that the marriage was valid under the laws of the country where the marriage was deemed to have taken place. The judge had given detailed reasons for rejecting the marriage as being valid in Israel, or anywhere else, and this was clear from the determination at paragraphs 23 to 32. As for the issue of “habitual residence” this would only have become relevant once the marriage of the Appellant was accepted as having been validly performed. Given that the marriage had been rejected

as being valid, there would be no material error with regards to the issue of “habitual residence”.

25. Ms Aboni drew attention to the case of Nessa [1999] UKHL 41; to the case of AA (Somalia) [2004] UKIAT 00031 at paragraph 36; and the case of Arogundade [2013] EWCA Civ 823. With the exception of the last of these cases, the first had been referred to by Mr Holmes in taking me to the case of AA (Somalia). Mr Holmes submitted that given that the marriage had not been accepted as being subsisting, the relationship was not one that was similar to marriage, and at best a friendship or a courtship relationship (as confirmed by the judge at paragraphs 33 and 38) and so the appeal properly stood to be refused. The burden had always been upon the Appellant. At paragraph 9 the judge makes it clear that there was insufficient evidence to demonstrate that the marriage was valid. The judge was entitled to so conclude. There was no unfairness to the Appellant in refusing an adjournment because the Appellant always knew what the issues were. Finally, as far as Rule 15(2) was concerned this only came into operation once it had been accepted that there had been an error of law by the judge, which Ms Aboni enjoined me to find that there had not been.

Error of Law

26. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
27. First, it is plain that this jurisdiction has, on a previous occasion, addressed the issue of what is meant by the concept of “habitual residence” and it has made it clear that the concept is not the same as appears in the Refugee Convention. The judge had before him the reference to AA (Somalia) [2004] UKIAT 00031, and did indeed give a thorough consideration to that case (see paragraphs 30 to 32). Indeed, the judge went on to consider how “habitual residence” differs from “ordinarily residence”. Although the two concepts overlap with each other, the concept of habitual residence was altogether more looser and less stringent. This is clear from the reference in AA (Somalia) to what had been determined by the higher courts, and was indeed cited in full by the judge in this case, namely, that “a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration” (see paragraph 32 of the judge’s determination). In this case, as far as the Appellant was concerned, he had been given a conditional release permit in Israel. As far as he was concerned the “regular order of his life for the time being” was in Israel. In AA (Somalia) it had been accepted that the reference to “whether of short or long duration” could, in the case of habitual residence, be as little as one month.
28. In the Appellant’s case, he had been resident there on a legal basis for as long as five years. He may not have been “ordinarily resident” in Israel, but he was “habitually resident” in Israel. Accordingly, the judge erred in concluding that the Appellant was not habitually resident in Israel, and the suggestion that, “his last country of habitual residence was Sudan” (at paragraph 32) was not correct. That may have been the last

country of habitual residence. However, over the last five year period he was now habitually resident in Israel. There could be no question about that.

29. Second, the judge erred in concluding that “the Appellant has failed to demonstrate that the marriage is subsisting” because “they have only ever met post the purported marriage for a short period in Egypt” (at paragraph 33). In the circumstances, where the Appellant and the Sponsor were unable to be physically together because the Sponsor was in Israel and the Appellant was in Sudan, it is difficult to see what else the two of them could have done to show that their marriage was genuine was subsisting. This is because the judge accepted that the Sponsor maintained contact with the Appellant “regularly through social media allowing contact every day”. The judge recognised that “they spent two months together in Egypt between January and March 2017” and this was “after the application was refused”. Moreover, “there are photographs of them together in the bundle” (paragraph 12). On the balance of probabilities test, on any view the marriage was genuine and subsisting.
30. Third, given that I have found there to be an error, I take into account the Rule 15(2) application that is now before this Tribunal, and would have been before the judge below had an adjournment been granted, in relation to the basis of the refusal letter, namely, that the marriage was not genuinely undertaken as far as Israel was concerned, when it was abundantly plain that the relevant question was whether it was valid in Sudan. I have an affidavit from Nadal Eltoum Alshareef, who is the advocate and commissioner, who attests to an affidavit from the Appellant, confirming that a marriage certificate number 74793 was issued from the judiciary in Sudan on 14th December 2012. I have confirmation of this from the judiciary of Sudan which attests to this fact by a stamp dated 23rd May 2018.
31. There is before me also a translated document from the University of Khartoum, dated 14th May 2018, which contains a legal opinion “fatwa” to the effect that “Sharia approves conclusion of marriage by proxy on the ground that any act permissible to be performed personally by any individual, that individual shall have the right to point another party for performing that act on his behalf. And the proxy in marriage may be on behalf of the two parties to the contract ...”. These documents are in addition to the documentation that Mr Holmes referred me to, which had been carefully compiled in the supplementary bundle to the Upper Tribunal dated 1st June 2018.
32. On a balance of probabilities, the Appellant discharges the burden of proof that is upon her because proof exists that the marriage by way of proxy is valid in Sudan and it is so confirmed through court documents and other official sources.

Re-Making the Decision

33. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed
Deputy Upper Tribunal Judge Juss

Date
8th September 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have made a fee award of any fee which has been paid or may be payable.

Signed
Deputy Upper Tribunal Judge Juss

Date
8th September 2018