Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
OA/10204/2015

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On: 19th November 2018	**On 27th December 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Ahmed [S]

Appellant

And

Entry Clearance Officer, Nairobi

Respondent

For the Appellant:	**Ms Warren, Counsel instructed by Duncan Lewis & Co**
For the Respondent:	**Mr Bates, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Ethiopia date of birth 20th November 1982. He appeals with permission the decision of the First-tier Tribunal (Judge A Kelly) to dismiss his appeal on human rights grounds.

2. The Appellant seeks leave to enter the United Kingdom for the purpose of settlement with his wife and three British children. I note at the outset that he made his application as long ago as the 18th January 2012. At the time that he

made his application his wife was a recognised refugee. She is now naturalised as a British citizen.

Error of Law

3. The First-tier Tribunal decision is dated 17th March 2017. In brief summary the appeal is dismissed on the grounds that the Appellant could not meet the requirements of paragraph 319L of the Immigration Rules, since he had not at the date of the Respondent's decision passed the relevant English language test or demonstrated that he would be adequately maintained without recourse to public funds if he entered the United Kingdom. The Tribunal went on to dismiss the appeal on Article 8 grounds on the basis that it could not be satisfied that the Sponsor and Appellant were in a genuine and subsisting relationship. The existence of three children did not persuade the Tribunal otherwise: "no DNA evidence has been provided to establish this even though the genuineness of the relationship was questioned by the Entry Clearance Manager's review of the 23rd May 2015".

4. This matter first came before me as on the 30th July 2018 when Mr Bates for the Respondent conceded that the decision of the First-tier Tribunal was flawed for material error of law. He invited me to set the decision aside in its entirety. The parties agreed that the First-tier Tribunal had erred in fact, and in raising new grounds for refusal without giving the Appellant an opportunity to respond: in particular there was no foundation for the Tribunal's finding that this was not a genuine relationship. There never had been an Entry Clearance Manager's review in this case. The Respondent accepted that this was a genuine and subsisting relationship and had never suggested otherwise. If the Tribunal had any doubts about the sincerity of the Sponsor's evidence (and indeed that of the Appellant) Counsel should have been put on notice of that fact. The Appellant was not given an opportunity address the Tribunal's concerns. I agree that those cumulative errors are such that the decision must be set aside in its entirety, since I cannot be satisfied that the erroneous findings on relationship did not colour the Judge's findings on other matters in issue.

5. I would add that the Tribunal further erred in directing itself, insofar as the English Language test was concerned, that the relevant date for its enquiry was the date of the ECO's decision. This was a human rights appeal under s82 of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. As such s85A(2) of the 2002 Act had no application, since it had been repealed on the 20th October 2014: the Tribunal was therefore tasked with determining whether, at the *date of the appeal before it*, the Appellant should be granted entry clearance on Article 8 grounds. This error was material because at the date of the ECO's decision the Appellant had not passed the relevant test,

whereas by the date of the appeal he had. Since there is no temporal requirement in the rules itself (see below) this was a matter which should have been resolved in the Appellant's favour.

The Decision Re-Made

6. Unfortunately – very unfortunately given the already unacceptable delays in this case – I was not able to proceed to remake the decision in the appeal on the 30th July 2018. The matter has come back before me today for remaking. At the hearing I was assisted by submissions from Mr Bates and Ms Warren, and at the close I indicated that I would allow the appeal. I now give my reasons.

7. The salient facts are best set out in chronological terms:

2005	The Sponsor (S) arrives in the United Kingdom and claims asylum
26.4.07	S is granted five years' leave to remain as a refugee
2008	S travels to Ethiopia and is introduced to A
12.6.09	The couple are married in Ethiopia
July 09	A applies for entry clearance
29.7.09	A is refused entry clearance on the ground that S was under 21 pursuant to paragraph 277 of HC395
19.9.09	A starts work in the Addis Ababa branch of 'Mustaqbal United Kingdom Ltd', a money-transfer business
19.9.10	The couple's first child is born in Manchester
9.1.12	A applies for entry clearance under paragraph 319L
23.01.12	A refused entry clearance on the ground that S only has 'discretionary leave' and so is not settled for the purposes of the Immigration Rules
3.8.12	S granted Indefinite Leave to Remain as a refugee
8.1.13	The Respondent concedes, at First-tier Tribunal hearing, that the ground for refusal was wrong, because at date of decision (the

	then operative date for determination of the appeal) S was a refugee and so entitled to sponsor her husband's application for entry clearance. The decision is withdrawn and Tribunal is rendered *functus officio*
31.1.14	Couple's second child is born in Manchester
Feb 2014	S granted British nationality
4.11.15	A is served with a fresh refusal (dated 8.1.13). Reasons given are that A has not passed his English Language test, nor demonstrated that he will be maintained without recourse to public funds
9.6.16	A passes requisite English Language test
29.3.15	Couple's third child is born in Manchester
14.3.17	First-tier Tribunal Judge Kelly dismisses A's appeal

8. The parties agree that the legal framework for the proper determination of this appeal is as follows. Paragraph 317L, the part of the Immigration Rules relied upon by the Appellant, is deemed by the Respondent to be a 'human rights claim'[1]. The Appellant further asserts that he wishes to be reunited with his family. The appeal before me is therefore a 'human rights appeal' and as such the relevant date for my enquiry is the date of today's hearing[2]. I must first determine whether or not the Appellant qualifies for leave to enter under any relevant 'human rights' provision of the Immigration Rules, and if he does not, determine whether the decision to refuse to grant him entry clearance amounts to a disproportionate interference with, or lack of respect for, his Article 8 family life.

[1] "The applications listed in this section and made under the Immigration Rules are human rights applications and the starting position is that there is a right of appeal against refusal. The relevant applications are those made under…part 8 of these Rules (family members) where… the sponsor is present and settled in the UK or has refugee or humanitarian protection in the United Kingdom" from the Respondent's published policy document *Rights of Appeal version 7.0*

[2] This appeal has proceeded, since the day it was lodged in the First-tier Tribunal, on the basis that the refusal decision was not served upon the Appellant until the 4.11.15. A decision takes effect on the day upon which it was served: R (on the application of Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36.

The Immigration Rules

9. I start then with the rule. Paragraph 319L reads:

> 319L. The requirements to be met by a person seeking leave to enter the United Kingdom as the spouse or civil partner of a person with limited leave to enter or remain in the United Kingdom as a refugee or beneficiary of humanitarian protection, are that:
>
> (i) (a) **the applicant is married to or the civil partner of a person who has limited leave to enter or remain in the United Kingdom as a refugee** or beneficiary of humanitarian protection granted such status under the immigration rules and the parties are married or have formed a civil partnership after the person granted asylum or humanitarian protection left the country of his former habitual residence in order to seek asylum or humanitarian protection; and
>
> (b) **the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State** for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference)…
>
> (ii) **the parties to the marriage or civil partnership have met**; and
>
> (iii) **each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting**; and
>
> (iv) **there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively**; and
>
> (v) **the parties will be able to maintain themselves and any dependants adequately without recourse to public funds**; and
>
> (vi) the applicant holds a valid United Kingdom entry clearance for entry in this capacity.

10. I note that paragraph 319L, unlike other parts of the Immigration Rules, contains no temporal restriction on when the requirements therein must be met. There is, for instance, no reference in the opening sentence to requirements being met "at the date of application". The provisions in respect of maintenance and accommodation are forward looking: "there *will* be adequate accommodation", "the parties *will* be able…". I am therefore satisfied that if the Appellant can show, on the balance of probabilities, that he meets all of the substantive requirements of the rule today (ie all but sub-paragraph (vi)) his appeal would fall to be allowed on human rights grounds, since the Respondent could not show the decision to maintain refusal to be proportionate.

11. Mr Bates submits that the Appellant today falls at the first hurdle, since his wife is no longer in possession of limited leave to remain as a refugee: she is British.

That is correct. I have before me a copy of S's British passport showing it to have been issued on the 21st April 2014. Pursuant to the decision in ZN (Afghanistan) v Secretary of State for the Home Department [2010] UKSC 21 the fact that she *was* a refugee is of no assistance to the Appellant today. The requirements relating to refugee family reunion are less exacting than those relating to British nationals for good reason: refugees cannot reasonably be expected to immediately meet, for instance, the minimum income requirement set out in Appendix FM (at E-LTRP.3.1.), whereas persons who have been here long enough to acquire British nationality can. It is for that good, and proportionate, reason that the rules differentiate between different classes of sponsor. The Appellant cannot, as of today's hearing, show that he meets the requirements of 319L(i)(a).

12. As to the second requirement, Mr Bates confirmed that the test taken, and passed by the Appellant on the 9th June 2016, is of the requisite standard, and that it was administrated by an approved provider under Appendix O of the Immigration Rules. As I note above, at the date of the appeal before Judge Kelly, this certificate was determinative evidence that the Appellant met the requirements of paragraph 319L(i)(b) as of that date. However the passing of time means that this certificate is no longer valid. Appendix O of the rules provides that such a certificate is only considered valid for two years from the date of issue. The certificate therefore expired in June of this year, and I am unable to find that the Appellant meets this requirement, albeit that he did so for the two year period in which the certificate was valid.

13. Mr Bates accepts that the requirements of 319L(iii) and (iv) are met: the parties have met in person, intend to live together and the marriage is genuine and subsisting. It is further accepted that since the Appellant will be sharing a room with his wife, the requirements of 319L(v) in respect of accommodation are also met: I note that the file contains a letter from S's landlord, City South Manchester Housing Trust, confirming that they consent to the Appellant joining his family and that this would not result in any overcrowding in this three bedroom home.

14. As to maintenance, Mr Bates made no such concession but invited me to assess the evidence before me on the balance of probabilities. That evidence indicates that the Appellant has worked for the same money-transfer business since September 2009. The company is called Mustaqbal UK Ltd. He works in their Addis Ababa office. In his letter of the 13th February 2017 Mr Mohamed Adan, Director of Mustaqbal UK Ltd confirms that his offer, originally made in 2015, holds good: he would like to offer the Appellant a role in the company headquarters in the United Kingdom, and does so because of the Appellant's proven "ability, knowledge, responsibility, loyalty and determination". I have also been provided with numerous money transfer receipts and S's bank

statements, which support the evidence offered by Appellant and S to the effect that he has been supporting his family in this country by sending them money from Ethiopia on a regular basis. As of 16th November 2015 he held 315,999 Ethiopian Birr in savings in the Construction and Business Bank in Dire Dawa (on that date this equated to approximately £10,886), and a further Birr 80,000 in the Wegagen Bank (£2440). I do not have any contemporaneous evidence about the current level of savings held by the Appellant but I do note a later statement, issued by the Commercial Bank of Ethiopia in February 2017 closes with a balance of Birr 131,132 (£4581.07). Whatever his current balance shows, I am satisfied that the evidence as whole indicates that a) the Appellant has been employed since 2009 by Mustaqbal UK Ltd b) he has earned enough money to be able to send money to his family here and c) has also managed to save significant sums during that period. I place considerable weight on those factors in evaluating whether it is more likely than not that the Appellant will be able to find employment when he comes to the United Kingdom. I am prepared to so find. Before me the Respondent made no specific criticism of the letters from Mustaqbal UK Ltd and given the remaining evidence I see nothing inherently incredible or suspect in their indication that they would be willing to transfer the Appellant's role to one of their United Kingdom offices. In making this assessment I have taken account of the Appellant's long experience with the company, and the fact that he holds a number of qualifications, including an 'A' grade in the English language at 'General Secondary Education' level, and various diplomas including in IT skills.

15. The relevant provision of the rule relates only to maintenance of the Appellant himself: the rule contains no Appendix FM-style requirements as to household income and Mr Bates agreed that as the mother and children are British they have their own entitlements to state support. I am satisfied that if the Appellant has been earning enough in Addis to support himself, his family in the United Kingdom *and* save, on the balance of probabilities it is likely that he will earn enough here to be able to "adequately" maintain himself, that is to say his income will be greater than what his notional entitlement would be to any state benefits. I find that the requirements of 319L(v) would be met.

16. The Appellant has not been able to demonstrate that he meets all of the requirements of the rule, in particular those at 319L(i). He cannot therefore succeed on 'human rights grounds' with reference to the rules.

Article 8

17. Mr Bates accepts that the Appellant enjoys a family life with his wife and children. Since their marriage the Appellant and his wife have maintained regular contact by telephone and other 'modern means of communication' such

as internet-based video chats. The eldest child has been to Ethiopia to see his father on two occasions, staying for 2 months in 2013 and with his siblings, 6 weeks in 2017. Like their mother the children see the Appellant over 'video-chat' and speak with him by telephone. A letter from the eldest child's primary school confirms that he speaks about his father at school, and offers the collective opinion of teacher, classroom assistant and headteacher that it would be beneficial for him if his parents were to be reunited. I am satisfied, having regard to the relatively low standard required to engage Article 8, that the decision to refuse entry clearance amounts to an interference – or lack of respect – such that the rights are in play.

18. Ms Warren accepted that the Respondent's position of refusing entry clearance to persons who do not qualify for leave to enter under the Rules is rationally connected to the Article 8(2) aim of protecting the economy.

19. In my assessment of proportionality I must have regard to the public interest in the maintenance of immigration control, and I recognise that the rules are framed to properly 'strike the balance' between the rights of those already in the United Kingdom with those who would seek to come here. I bear in mind that it is in the public interest that persons who seek to remain in the United Kingdom are financially independent and able to speak English, since such persons are better able to integrate. In this case I am satisfied, for the reasons set out at §14-15, that the Appellant is financially independent. I am satisfied that he and his family will not have any additional recourse to public funds, should he come to this country: Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58. I am further satisfied that the Appellant is able to speak English. Although his certificate has officially 'expired' I note that the bundle contains various certificates in English language instruction dating from 2003 (when the Appellant achieved an 'A' grade at the equivalent of GCSE) to 2016, as well as other diplomas in *inter alia* marketing, management and IT, all apparently taught in English. On the balance of probabilities I consider it unlikely that he will have forgotten English if he has been able to speak it, to the basic level required, for some 15 years. I note that these factors cannot weigh in his *favour*: it simply means that I do not have to weigh these matters against him in the overall balancing exercise.

20. I turn now to the reasons advanced by Ms Warren as to why, in the very particular circumstances of the case, the decision to refuse entry is disproportionate, notwithstanding the Appellant's failure to meet the requirement of the rules.

21. This is a man who has been seeking entry clearance to join his wife in this country for nine years. He was refused entry clearance in 2009 on – as far as I am aware – the sole ground that at the date of the application the S was not yet

21 years old. The rule that mandated refusal in those circumstances was subsequently struck from HC395 after the Supreme Court held the imposition of such a minimum age limit to be unlawful: Quila & Anr v Secretary of State for the Home Department [2011] UKSC 45. Had the opinion of the Supreme Court been available to the decision maker at that time there is every reason to believe that entry clearance would in fact have been granted. In 2012 a second refusal decision was premised on the sole reason that S could not sponsor the application because she had only discretionary leave. That was, as the Respondent now fully accepts, an error of fact. S was a recognised refugee at the relevant time. The S and the Appellant's representatives therefore headed towards his appeal hearing in January 2013 with high confidence, only to be stymied at the door of the court when the ECO, recognising the error, withdrew the decision. This left the Tribunal, and the Appellant, without any power to address the decision. There is every reason to believe that the First-tier Tribunal would have allowed that appeal that day, since the only matter in issue had to be resolved in the Appellant's favour.

22. By the time that the fresh refusal decision was served on the 4th November 2015 the legal – and factual – landscape had changed. The Appellant now had to pass a specified English language test, and his wife had naturalised as a British citizen. As can be seen from my decision above, it is these factors which defeat the Applicant's claim under the rules. I recognise that failure to be a matter to which I must attach significant weight in the balancing exercise.

23. There is however one other factual development which I am bound to treat as a primary consideration. The Appellant is now father to three British children, all of whom are growing up without him. Mr Bates accepted without hesitation that it would be in their best interests to live with both their parents and I find that that was a concession properly made. I have before me a statement sworn on the 13th April 2017 by S's sister in the United Kingdom, a Ms [LM]. Ms [M] makes various observations about the way that this case has been dealt with over the years but for the purpose of this decision, the relevant section of her statement relates to how her sister and her children are coping without the Appellant: "desperate" and "struggling" sum it up. The Appellant, for his part unsurprisingly states, in his statement of the 13th February 2017, that he misses his family enormously. He just wants to be granted entry clearance so that he can work to better support his family, and live a normal life with his wife and children.

24. In his submissions Mr Bates asked me to note that this 'family life' has, since its inception', always been enjoyed the way it is today. Wife and husband married knowing that they lived in different countries. They decided to have children knowing that he was still in Ethiopia. The children have never known any different: their father has always been a distant figure at the end of a phone line.

He accepted that this was not a matter logically capable of going to whether the decision in fact betrayed a 'lack of respect' for this family life (the first *Razgar* question): such a submission would be inconsistent with the fact that parliament has specifically identified Article 8 as the sole ground of appeal in entry clearance cases. Rather Mr Bates submitted that it was a factor to be taken into account in measuring the impact of continued separation on the individual family members: it was therefore relevant to the question of proportionality.

25. I have given that matter careful consideration. I am nevertheless satisfied that I must place substantial weight on the best interests of the children. The reality is that these British children have been born and grown up here. Their home, school and friends are here. It is inconceivable to S that she would uproot the children from this security to move to Ethiopia (assuming she would be given entry to that country). The decision in this appeal means that they will either grow up with their father, or without him. The family did not simply 'choose' to live separately. The Appellant made his application for entry clearance as long ago as 2009, and has been doggedly pursuing his case since then. As the peculiar history of this case demonstrates, the Appellant has twice lost out, though no fault of his own, to factors beyond his control. The factors I have identified at §21 above cannot be characterised as 'near misses': it is more that the Appellant hit the target but was denied his prize. Today his claim under the Rules is defeated, in essence, by the fact that his wife further integrated herself in the United Kingdom by claiming the nationality to which she was entitled (I say this, I recognise, assuming that the Appellant could, if there were utility in him so doing, be able to provide yet another English Language test certificate to go with his collection in the bundle). Against that background I am satisfied that it would be wholly disproportionate to expect the Appellant to re-take his test and make yet another application for entry clearance. Even assuming that there was a provision under the Rules under which he could make such an application[3] it would mean yet further delay and more time that the children would be separated from their father – separation which the Respondent properly recognises to be contrary to their best interests.

26. Having considered all of the factors identified above, and recognising the weight to be attached to public interest in refusing persons who cannot meet the requirements of the rules, I am satisfied that on the particular facts of this unusual case it would be disproportionate to deny the Appellant entry clearance as a spouse. I therefore allow the appeal on human rights grounds.

[3] Mr Bates was unable to identify any provision which might be applicable. I note that paragraph E-ECP.3.2 of Appendix FM sets out the types of income that may be taken into account in determining whether an applicant can meet the 'minimum income requirement' of £18,600. It does not include the overseas earnings of the applicant. Since S is primary carer to three young children, and there is no prospect of her being able to earn that money, it is difficult to see how the Appellant could now succeed under the rules.

Decision

27. The decision of the First-tier Tribunal contains errors of law such that the decision is set aside.

28. The decision in the appeal is remade as follows: "the appeal is allowed on human rights grounds".

29. There is no order for anonymity.

Upper Tribunal Judge Bruce
19th November 2018