Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: HU/04473/2019**

THE IMMIGRATION ACTS

Heard at Field House (via Skype)	**Decision & Reasons Promulgated**
On 11 March 2021	**On 24 March 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

IMAN MOHAMMEDIEN HUSSEIN IDRIS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, PRETORIA

Respondent

Representation:
For the Appellant: Mr Holmes, of counsel, instructed by All Nations Legal Services
For the Respondent: Mr Avery, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Sudanese national whose date of birth is given as 1 January 1997. She appeals against a decision which was issued by First-tier Tribunal Judge Monaghan on 22 November 2019. By that decision, the judge dismissed the appellant's human rights appeal against the respondent's refusal of her application for entry clearance as the spouse of a recognised refugee.

Background

2. The appellant and the sponsor are non-Arab Darfuris. She states that she has lived in a camp for internally displaced persons (the Nifasher Camp) in Darfur since 2004. She and the sponsor are said to have married in Darfur in 2013. I shall refer to the sponsor as IH. He made his way to the United Kingdom, arriving on 25 April 2014. On 19 August 2014, he underwent an

asylum screening interview in which he stated that he had been married since 2013 and named the appellant as his spouse. I have no further information about his asylum claim but it is not in issue between the parties that he was granted limited leave to remain as a refugee in August 2014.

3. The appellant has applied for entry clearance as IH's spouse on four occasions. The previous applications were refused on 6 February 2018, 26 April 2018 and 26 September 2018. I do not understand her to have appealed against any of those decisions. She made her most recent application for entry clearance on 31 October 2018. The application form was completed by her current advisors. Amongst other information disclosed in that form, the appellant stated that she had travelled to Ethiopia in October 2018 in order to spend time with the sponsor.

4. The application was refused by the Entry Clearance Officer on 10 February 2019. The ECO was not satisfied that the applicant was the partner of a person who had refugee status granted under the Immigration Rules or that the relationship had existed before the sponsor left Sudan (paragraphs 352A(i) and (iii) of the Immigration Rules refer).

The Appeal to the First-tier Tribunal

5. An appeal was lodged on 8 March 2019. The grounds of appeal responded to the ECO's decision in robust terms and invited an Entry Clearance Manager to review the decision. A review did take place on 20 May 2019 but the ECM maintained the decision, noting that there was no evidence from the UN or the Red Cross to show that the appellant and the sponsor had lived together in the IDP camp.

6. So it was that the appeal came before the judge, sitting in Bradford, on 11 November 2019. The appellant was represented by Mr Holmes, the respondent by a Presenting Officer. The judge heard oral evidence from the appellant and submissions from both advocates before reserving her decision.

7. In her reserved decision, the judge noted the reasons given by the ECO for refusing the application at [3]-[10] and the reasons given by the ECM for maintaining the decision at [12]-[16]. She noted Mr Holmes' reliance on two of the respondent's published policies regarding the significance, in a subsequent family reunion application, of a sponsor naming the applicant as their spouse during their asylum claim. At [19]-[39], the judge set out the appellant's claim, including a summary of the oral evidence given by the sponsor. At [40]-[43], she detailed the documentary evidence before her. The judge turned to her findings at [44].

8. At [45], the judge observed that the appellant had provided a number of documents to substantiate the claim that she and the sponsor had married in June 2013 and had lived in an IDP camp together before he came to the United Kingdom. The judge stated at [46] that she had a number of concerns about those documents. There was a joint certificate from the Camp Director and the Camp Mayor (of Nifasha Camp) but inadequate details (dates, names and signatures) appeared on the document. The judge noted that the certificate was also inconsistent with the sponsor's oral evidence as regards the date on which he had moved to Nifasha Camp (2005 or 2006): [47]. It was concerning that the author of the (separate) Certificate of Residence had

stated that the sponsor was presently living in the Abu Shouk Camp although he had left Sudan in 2014: [48].

9. At [49]-[54], the judge addressed issues in relation to the two marriage certificates which were relied upon by the appellant. She was concerned about the hesitant and reluctant manner in which the sponsor had given evidence about the way in which he had obtained the original certificate from 2013. The judge then considered the sponsor's explanation for the existence of two marriage certificates. In response to the ECO's concern about the coexistence of two certificates, the sponsor had said that they had been given a certificate by the sheikh who conducted the marriage ceremony in 2013 and that the appellant had taken that certificate to court in 2017 to get an official marriage certificate which was 'used when travelling abroad': [51]. The judge noted Mr Holmes' reliance on this explanation in his skeleton argument but she was concerned that there was no background material in support of it: [52]-[53]. At [54], she said this:

> Therefore I find that there is nothing, other than the sponsor's evidence to substantiate this point. I find that it is reasonably likely that the sponsor puts forward this explanation to explain firstly why there are two marriage documents and secondly why they are so far apart in date. I do not find his explanation a plausible one and it is not supported by background evidence.

10. At [55], the judge stated that she did not share the respondent's concern about the absence of registration documents (perhaps from the UNHCR) showing that the appellant and the sponsor had lived together in an IDP camp before he left to seek asylum. It was plausible, she thought, that the appellant and the sponsor would have been focused not on obtaining such documentation but on dealing with the harsh and difficult conditions in the camp. At [56], however, the judge considered that the sponsor's evidence that there was no 'big organisation' running the camp cast further doubt on the certificate from the Camp Director.

11. At [57]-[58], the judge set out what she considered to be the 'greatest credibility concern' in the case. The point occupies most of the ninth page of the judge's decision but might be summarised quite shortly. There was a discrepancy in the evidence about the camp in which the appellant and the sponsor were said to have married and lived. The marriage certificates and the documents from the camp officials gave the name of the camp as Abu Shouk, whereas the appellant and the sponsor had consistently given the name of the camp as Nifasha. The sponsor maintained that the camps were one and the same but the background material did not support that assertion.

12. The judge then addressed the fact that the sponsor had named the appellant as his wife when he claimed asylum. She recalled what was said in the two policy documents upon which Mr Holmes relied. At [60], she noted that the appellant's date of birth was given in the course of her application for entry clearance as 1 January 1997, whereas it had been given as 22 January 1997 in the sponsor's asylum claim. She continued:

> Even if I were to reach a finding that this is a mere error and that I can rely on this document as evidence the pre-flight relationship, I have decided that the plausibility and credibility concerns I have

> identified above and the unreliability of the documents before me do outweigh the evidence in the SEF form.

13. The judge was nevertheless prepared to accept, at [61], that the appellant and the sponsor were in a genuine and subsisting relationship (although it is to be recalled that this part of the Immigration Rule, sub-paragraph (v), was not placed in issue by the ECO). She was not satisfied that the Rules were met because the appellant had failed to persuade her that the marriage did not take place after the sponsor had left Sudan in order to seek asylum: [62]. She noted that it was open to the appellant to make a fifth application for entry clearance if she could present evidence that Abou Shouk and Nifasha were the same camp.

14. In the final paragraphs of her decision, the judge considered whether the appellant's ongoing exclusion was in breach of Article 8 ECHR. I reproduce those short paragraphs in full:

> [65] I find that there is evidence before me that the appellant and the sponsor exercising family life (although I make no finding about when it started). The decision to refuse the appellant entry clearance interferes with her and the sponsor's family life and the interference is of sufficient gravity potentially to engage the operation of Article 8. The interference is in accordance with the law and is necessary for the purpose of maintaining a firm immigration control. Therefore the question to be decided is whether the refusal of entry clearance in this case is proportionate to the legitimate end sought to be achieved.
>
> [66] The fact that the appellant did not satisfy the requirements of the Immigration Rules in relation to Family Reunion at the date of the decision must be given significant weight in my assessment of proportionality in this case. It is in the public interest to maintain a fair and firm immigration control. There is nothing disproportionate about the respondent's decision to refuse entry clearance as the Rules have not been met.

The Appeal to the Upper Tribunal

15. There are four grounds of appeal, each of which found favour with Designated Judge Shaerf in his decision on the application for permission to appeal. They may be summarised as follows:

    (i) The judge failed to undertake any meaningful Article 8 ECHR assessment.
    (ii) The judge misdirected herself in law in finding the sponsor's explanation for the two marriage certificates to be implausible.
    (iii) The judge had made a mistake of fact which had given rise to unfairness in relation to the two certificates.
    (iv) The judge failed to consider the evidence in the round or fell into the error described in Mibanga [2005] EWCA Civ 367, [2005] INLR 377 in her treatment of the naming of the appellant in the sponsor's asylum claim.

16. I should note that the third ground was supported by an application under rule 15(2A) (to rely upon documents which had not been before the FtT) and copies of documents from the Norwegian Landinfo department and the US Department of State.

17. 'Covid-19' directions were issued by Upper Tribunal Judge Allen in July 2020, seeking to progress the appeal without a hearing. Those directions elicited a lengthy skeleton argument from Mr Holmes and rather shorter written submissions from Ms Wilcocks-Briscoe, on behalf of the respondent. The respondent indicated that the appeal was opposed in its entirety.

18. On 25 November 2020, Upper Tribunal Judge Keith directed that the appeal should be heard remotely.

Submissions

19. With my permission, Mr Holmes addressed the grounds in the order he had chosen in the skeleton argument. At the outset, he made a short point in development of ground four, which was that the sponsor was a man of good character and that this had not been borne in mind by the judge when assessing his credibility. I asked what the evidential foundation for this submission was, and Mr Holmes confirmed that it was nothing more than the fact that the sponsor is accepted on all sides to be a refugee.

20. In further development of ground four, Mr Holmes referred to the policy documents which had been before the judge. She had erred, he submitted, in 'compartmentalising' her credibility assessment in the manner prohibited by Mibanga. She had also taken a point which was not raised by the ECO or the Presenting Officer, regarding the appellant's date of birth. The 'Mibanga error' was apparent, Mr Holmes submitted, from the judge's use of the word 'outweigh' in [60] of her decision and from the fact that she had overlooked the sponsor's identification of the appellant in his SEF at [54] of her decision.

21. As regards the second ground, which focused on the two marriage certificates, Mr Holmes submitted that the judge had erred in treating the sponsor's account as implausible. The two-staged process which the sponsor described was supported to a certain extent by the documents adduced by the appellant. The dangers of such an approach had been highlighted by the Court of Appeal in cases such as HK (Sierra Leone) [2006] EWCA Civ 1037 but the judge had nevertheless fallen into the 'familiar trap' considered in those decisions. The judge was required to assess the oral evidence on its own merit and the sponsor had not given evidence in this respect which was in any way surprising. It was to be recalled that it was not uncommon – even in the UK context – for a couple to have two different ceremonies of marriage. It was dangerous, he submitted, for the judge to 'delve into' what might and might not be plausible as regards marriage registration in Sudan.

22. Mr Holmes submitted that ground three and the evidence adduced in support of it established that the judge had fallen into a mistake of fact of the type considered in MM [2014] UKUT 105 (IAC). The documents from Landinfo and the US Department of State showed clearly that the two-staged process which the judge had considered so suspicious was exactly the process which was followed in Sudan. The stamp on the second certificate, which showed that it had been validated by the Sudanese Department of Foreign Affairs, corresponded with the process described by the sponsor and the background material.

23. I indicated that I did not need to hear from Mr Holmes on his complaint about the judge's treatment of Article 8 ECHR outside the Rules.

24. In response, Mr Avery submitted that the appellant's real complaint amounted to nothing more than one of weight, whereas it was trite that matters of weight were for the trial judge. The judge was not required to state that the sponsor was of good character and then work backwards from that point; the reliability of a witness was always a matter for the judge.

25. Mr Holmes had made much of the sponsor's declaration of the appellant's name in his asylum claim but the point had been considered by the judge. She had borne in mind the respondent's policy. Mr Holmes merely disagreed with the judge's weighing of the various competing considerations but this established no legal error on the part of the FtT. The judge's concern about the marriage certificates being issued in 2013 and 2017 was not a new point; it had been identified by the ECO. It was wholly unclear why the appellant had not adduced the Landinfo and USDOS documents before the judge, in the circumstances.

26. In any event, Mr Avery submitted, the appellant had not attempted to take issue with the most significant point taken by the judge, regarding the Abou Shouk and Nifasha Camps. The judge's other conclusions were all to be considered through that prism.

27. Mr Avery did not wish to advance any oral submissions in response to the Article 8 ECHR grounds of appeal. He relied solely on the written submissions previously filed.

28. In reply, Mr Holmes accepted that the Landinfo and USDOS documents could have been before the judge but that was nothing to the point, he submitted. The critical point was that the judge had made a mistake of fact without these documents and that unfairness had arisen. Mr Holmes was without instructions on the question of why these documents had not been before the judge, although he took it to be the case that the appellant's representatives had assumed that they had met the point taken by the ECO and that background material was not required.

29. Mr Holmes underlined that his primary submission was made in reliance on Mibanga and the compartmentalisation of the credibility assessment. That was not a matter of weight; it was well established to represent a matter of law. Responding to a point I had considered with Mr Avery, he invited me to consider carefully whether there was a specific Immigration Rule dealing with post-flight spouses.

30. At the conclusion of the submissions, I was able to indicate to Mr Holmes that I was with him in relation to his first ground (regarding the adequacy of the Article 8 ECHR assessment outside the Rules) but that I would need to reflect further on the remaining matters. On the question of relief, both advocates submitted that I should retain the appeal in the Upper Tribunal in the event that only ground one was made out and that the appeal should be remitted de novo to the FtT in the event that the other grounds were made out.

31. Subject to the indication I had given in relation to ground one, I reserved my decision.

Analysis

Ground One

32. As I announced after the submissions, I am quite satisfied that the judge erred in law in her assessment of Article 8 ECHR outside the Rules. I have reproduced the entirety of her consideration above. The final sentence of [66] is of particular concern, suggesting as it does that the judge's Article 8 ECHR assessment started and finished with her conclusion that the Immigration Rules were not met. Insofar as it is necessary to refer to authority to establish that it was an error to adopt such an approach, it only necessary to recall what was said by Lord Bingham at [6] of Huang [2007] UKHL 11; [2007] 2 AC 167: that an applicant's failure to qualify under the Rules is the point at which to begin, not end, consideration of the claim under Article 8.

33. That dictum is obviously to be read alongside its subsequent qualification in cases such as R (Agyarko) v SSHD [2017] UKSC 11; [2017] 1 WLR 823, in which Lord Reed noted, at [8], that Lord Bingham was considering a framework in which the Rules did not reflect an assessment of the proportionality of decision making in relation to Article 8. But paragraph 352A is not part of the group of provisions to which that qualification relates; unlike Appendix FM of the Rules, it was not designed to reflect an assessment of proportionality. It was designed, instead, to reflect the recommendation made by the Conference of Plenipotentiaries which adopted the Refugee Convention to ensure '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'. The same principle, differently worded, is reflected in Article 23 of the Qualification Directive. The paragraphs of the Rules which reflect these objectives do not purport to reflect a structured Article 8 ECHR assessment, which must therefore be undertaken after a conclusion is reached under those Rules, in compliance with Huang.

34. As noted by Mr Holmes in his first ground of appeal, the approach adopted by the judge in respect of Article 8 ECHR demonstrably leaves material matters out of account. It is correct that the judge was entitled to attach weight – on one side of the balance sheet suggested in Hesham Ali v SSHD [2016] UKSC 60; [2016] 1 WLR 4799 – to the fact that the appellant could not meet the Immigration Rules. But there were necessarily other matters which featured on the appellant's side of that balance sheet, not least the fact that there is a genuine and subsisting relationship which cannot continue in Sudan due to the fact that the sponsor is a recognised refugee from that country. Also relevant on that side of the scales was the judge's conclusion that the camp in which the appellant lives is characterised by harsh and difficult living conditions. It might be that these matters were insufficient to tip the scales in the appellant's favour in light of the judge's finding that she could not meet the Rules. That is particularly so when, as Ms Wilcocks-Briscoe noted in her written submissions for the respondent, the judge apparently concluded that the appellant and the sponsor had entered into a relationship (or a marriage) after he had fled to the UK. On the basis of that apparent finding, they must have known, or must be deemed to have known, that they were entering into a difficult or long-distance relationship. I accept the submission made by the respondent that this was all relevant to the assessment of proportionality but I am unable to conclude that there was no claim which was capable of succeeding outside the Rules. The judge's brief consideration of that issue was inadequate as a matter of law, even when the decision is read as a whole.

Ground Four

35. Mr Holmes's main oral submission was that the judge had misdirected herself in law in undertaking what he described as a 'compartmentalised' assessment of the sponsor's identification of the appellant in his asylum claim. On this point, I agree with Mr Avery.

36. It is simply not correct to assert that the judge 'compartmentalised' her assessment and that she fell into the error recognised by the Court of Appeal in Mibanga and reconsidered recently by a senior constitution of the Upper Tribunal in QC [2021] UKUT 33 (IAC). The judge's decision shows no such 'structural failing'. Mr Holmes submits that the judge's use of the word 'outweigh' in [60] (as above) illustrates the error in her approach but it does no such thing. By her use of that word, the judge demonstrates that she was doing what was required of her, by considering all that told for and against the appellant's account and weighing the competing considerations. She was clearly aware of the respondent's policy, which recognises that the identification of a family member during an asylum claim is a 'strong indication that they formed part of the pre-flight family unit' because she cited that policy at [59] of her decision. Given the concerns she had previously expressed about the account, however, she considered that strong indication to be 'outweighed' by the negative pull of the other considerations. She did not treat the sponsor's declaration as an 'add-on' (Mibanga refers, at [24]), which was to be dismissed because she had previously reached an adverse view. Instead, she reviewed the evidence as a whole and reached a holistic view that it was not be accepted. I reject Mr Holmes' main submission for these reasons.

Ground Three

37. Nor do I accept that the judge made a mistake of fact when she concluded that the sponsor's account about the two marriage certificates was unsupported by the background evidence. As Mr Avery noted, the point had been identified by the ECO and the appellant had failed to place any background material before the judge about it. Mr Holmes made an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for the admission of evidence which was not before the FtT. In compliance with that rule, he has indicated the nature of the evidence and has explained why it was not submitted to the FtT (as above). But it is to the decision in Ladd v Marshall [1954] 1 WLR 1489 which I must turn in considering whether to admit the Landinfo and USDOS material. I recognise that the approach in that Ladd v Marshall is applied with additional flexibility in public law proceedings: E & R v SSHD [2004] EWCA Civ 49; [2004] QB 1044 and Kabir v SSHD [2019] EWCA Civ 1162 refer.

38. On the facts of this case, that additional flexibility cannot, however, justify departure from the first of the Ladd v Marshall criteria (that the evidence could not with reasonable diligence have been produced at trial). Mr Holmes acknowledged that the ECO raised the dates of the two certificates in the notice of decision, and that the evidence could readily have been obtained and adduced before the judge. He acknowledges at [35] of his skeleton argument that the evidence was obtained in response to the judge's decision, in an attempt to answer the conclusions she had reached. In my judgment, there was a failure on the part of the appellant's representatives to consider in advance of the hearing before the FtT the evidence which should have been adduced in support of the sponsor's witness statement and there is no proper reason to admit that evidence on appeal. Without it, Mr Holmes is unable to establish any mistake of fact on the part of the judge.

Ground Two

39. Having rejected the second way in which Mr Holmes seeks to criticise the judge's findings regarding the two marriage certificates, I turn to the first. By ground two, he submits that the judge fell into error in concluding that the marriage certificate procedure described by the sponsor was implausible. He submits that the process of reasoning by which the judge reached that conclusion was impermissible as a matter of law.

40. My first impression of this complaint was in accordance with the respondent's written and oral submissions: the judge had simply drawn on the absence of background evidence and it was for the appellant to discharge the burden of proof to show that the two documents were reliable. On reflection, however, I consider Mr Holmes' criticism of the judge's approach to be well-founded.

41. The sponsor maintained that there were two certificates because the first was issued contemporaneously with the marriage in 2013 and the second was only obtained, in 2017, in order to support the applications for entry clearance which were to be made by the appellant. He suggested that the second was 'the official marriage certificate to be used when travelling abroad': witness statement, paragraph 2. As Mr Holmes submits, there was nothing inherently surprising about this assertion, not least when it is noted that the later certificate bears a stamp from the Department of Foreign Affairs. This was certainly not an account which could properly be said to be 'contrary to common sense and experience of human behaviour', which the judge was entitled to reject on that basis (Y v SSHD [2006] EWCA Civ 1223 refers, at [26]. In the circumstances, the judge was required to adopt the approach which was set out by Keene LJ at [27] of Y v SSHD: "he must look through the spectacles provided by the information he has about conditions in the country in question". The *absence* of background information on the specific point did not entitle the judge to conclude that the appellant's account was positively implausible and there was no proper evidential foundation for this important conclusion. In this respect, therefore, I consider that the judge also fell into legal error.

Materiality

42. Mr Avery submitted persuasively that the real thrust of the judge's concern about the timing of the marriage was to be found at [57]-[58], in which she attached weight to the difficulty in the evidence regarding the camp(s) in which the appellant and the sponsor were said to have lived. The submission was, ultimately that any failings such as that which I have found immediately above were peripheral matters which were immaterial to the outcome.

43. On reflection, however, I have come to the conclusion that this is not a case in which I can properly uphold the assessment undertaken by the judge as a result of those findings which remain unchallenged or not successfully challenged. The point about the name of the camp is a serious one, and was said by the judge (quite properly) to be the 'greatest credibility concern' but I am not able to conclude that she would have come to the same conclusion but for her error in finding that the issuance of certificates in 2013 and 2017 was in itself implausible. That conclusion was clearly an important part of the judge's decision that the sponsor's identification of the appellant in his asylum claim did not show that she formed part of his pre-flight family unit and I do not consider that the other credibility concerns would necessarily have justified the same conclusion. I am satisfied, in other words, that the judge's error at [50]-[54] vitiates her conclusion that the appellant was not part of the sponsor's pre-flight family unit.

44. In the circumstances, I am satisfied that the relief suggested by both advocates is appropriate. The appeal is accordingly remitted to the First-tier Tribunal for consideration afresh by a judge other than Judge Monaghan. (I should add that there can be no suggestion of preserving the judge's finding that the relationship between the appellant and the sponsor is a genuine and subsisting one, since that was never a point raised by the ECO.)

45. Upon remittal, the appellant will be at liberty to adduce the Landinfo and the USDOS material, which might properly be thought by the next judge to provide an answer to the concern about the issuance of the two marriage certificates. As I have noted above, it is surprising that this evidence was not adduced before the judge. The other evidence which is notable by its absence is anything to do with the sponsor's asylum claim. There is a two-page excerpt from his screening interview in the appellant's bundle but there is no copy of his asylum interview or of any witness statement. Nor is there any record of the respondent's consideration of his asylum claim (whether in an internal minute or a refusal letter) or any decision which was reached on appeal. Any such evidence is likely to have a significant bearing, one way or the other, on the question of whether the appellant and the sponsor did indeed spend time living together in the same IDP camp before his departure from Sudan. Either side should also take the opportunity to consider what evidence might be brought to bear on the *prima facie* logical conclusion by Judge Monaghan that the Nifasha and Abou Shouk camps are not one and the same.

Notice of Decision

The decision of the First-tier Tribunal is vitiated by legal error and is set aside in its entirety. The appeal is remitted to the FtT to be heard afresh by a judge other than Judge Monaghan.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

07 April 2021