Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/02394/2021
& HU/02396/2021
(UI-2021-001479 & UI-2021-001480)

THE IMMIGRATION ACTS

Heard at : Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On : 18 July 2022	**On : 8 September 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

HG
AG
(ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Flaherty, instructed by Gerald UK Immigration & Legal
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants, mother and son, are citizens of Eritrea, born on 9 October 1999 and 19 January 2019 respectively. They appeal, with permission, against the decision of the First-tier Tribunal dismissing their appeals against the respondent's decision to refuse them entry clearance to the UK under the Family Reunion provisions in the Immigration Rules.

2. The appellants applied, on 8 January 2021, for entry clearance to the UK to join the sponsor, the first appellant's partner and the second appellant's father, who had been granted refugee status in the UK. Their applications were both refused on 13 March 2021. They had previously applied for entry clearance on 9 October 2020 and were both refused on 19 December 2020 for the same reasons.

3. The respondent considered the first appellant's application under paragraph 352A of the Immigration Rules and concluded that she did not meet the requirements of the rules. The respondent noted that the first appellant had provided a marriage certificate which stated that she and her sponsor had married in the Eritrean Orthodox Church on 4 June 2017 in Khartoum, Sudan. The respondent noted further that the first appellant would have been 17 years of age at the time and that she was therefore below the legal age of marriage in Eritrea as stipulated under the Eritrea Civil Code. In the absence of any evidence to show that she met one of the relevant exceptions, her marriage was therefore considered to be null and void. The respondent noted further that the marriage ought to have been registered with the authorities in Sudan but that there was no evidence to show that it had been. In addition the respondent considered that it was not clear when the appellant and sponsor had met or when the relationship began, but it appeared that it may have begun in May 2017 after the sponsor had come to the UK and it had therefore not been shown that the appellant and sponsor had been in a relationship akin to marriage for a minimum of two years. The respondent noted in addition that the sponsor left Eritrea in July 2011 and travelled to Israel where he stayed for six years, and then to Rwanda, Juba, Sudan, Libya, Italy, Germany and Belgium and it was accordingly not accepted that the appellant formed part of her sponsor's family unit prior to him leaving Eritrea or Israel to seek protection. The respondent accepted that the appellant and sponsor had a son together (the second appellant) but considered there to be no evidence to demonstrate that their relationship was genuine and subsisting. The respondent concluded that the appellant failed to meet paragraphs 352A(ii), (iii) and (v) of the Immigration Rules and, further, that the evidence did not show any exceptional circumstances justifying a grant of leave outside the rules.

4. The second appellant's application was considered under paragraph 352D of the Immigration Rules but it was concluded that he did not meet the requirements of paragraph 352D(iii) and (iv) as the respondent was not satisfied that he formed part of the family unit with his sponsor prior to his exit from Eritrea and considered that he had been living as a family unit independently of his father for the majority of his life. Further the evidence did not show any exceptional circumstances justifying a grant of leave outside the rules as his best interests were to remain with his mother who had been his sole carer since he was born.

5. The appellants appealed against those decisions and their appeals were heard by First-tier Tribunal Judge Herwald on 28 October 2021. The appellants were legally represented at the hearing but there was no appearance for the respondent. The judge heard from the sponsor and had regard to the document

relied upon by the appellant's legal representative entitled: "Marriage Law in Eritrea: Types and Methods of Proof" dated 24 June 2018 at paragraph 2.1. He noted the sponsor's evidence, that he and the first appellant had met in July 2011 in church in Sudan where she was living as a refugee, that he travelled to Israel and stayed there for six years before returning to Sudan where he met and married the first appellant in May 2017 with the agreement of both their parents and that they lived together after leaving Sudan together in July 2017 and living in Libya for nearly a year and then travelling to Italy and Germany, where they made an unsuccessful asylum claim, and then Belgium. The sponsor's evidence was that they arrived in Belgium in June 2018 and the first appellant became pregnant. They decided to travel illegally to the UK but the first appellant was arrested in Belgium and had remained there, whilst he managed to get to the UK and claim asylum, obtaining refugee status at the end of 2019. He had never travelled to Belgium to see his wife or child. His wife and child, the appellants, were granted refugee status in Belgium.

6. The judge noted from the marriage certificate relied upon by the appellant that she and the sponsor were married on 4 June 2017. He had regard to the document relied upon by the appellant as evidence of their parents' consent to the marriage but concluded that it did not actually state in terms that the parents had agreed. He concluded that the first appellant was unable to meet the exceptions required by the law of Eritrea to show that her marriage was valid and he concluded that it was null and void. The judge did not accept that the appellant and sponsor had a genuine and subsisting marriage, noting that the sponsor had effectively abandoned his wife at a time when she was heavily pregnant. He considered that the communications between the appellant and sponsor, as appeared in the evidence, were manufactured for the purposes of the application. The judge did not accept that the sponsor had any relationship with his child, noting that he could have reunited with his child had he wished to. The judge concluded, therefore, that it had not been shown that the second appellant formed part of the sponsor's family unit prior to him leaving Eritrea or Israel and he found that neither appellant could meet the requirements of the immigration rules. With regard to Article 8, the judge concluded that any interference with the family life between the appellants and the sponsor would be proportionate for the reasons already given. He accordingly dismissed the appeals.

7. The appellant sought, and was granted, permission to appeal on the grounds that the judge had materially erred by failing to take account of material evidence, failing properly to consider the exceptions to marry, failing to take a broad approach in his consideration of the relationship, failing to give adequate reasons for his findings, and carrying out an inadequate and insufficient assessment of proportionality and the best interests of the child.

8. The respondent filed a rule 24 response resisting the appeal and the matter then came before me. Both parties made submissions.

9. Mr Flaherty submitted that the evidence before the judge, as referred to at [18(e)], was sufficient to show that the exception was met, in regard to the

legal age for marriage, and that the judge had erred by finding that it was not. Had he not made that factual error the judge would have found that the requirements of the immigration rules were met as regards the validity of the marriage. The judge had failed to consider the evidence of the appellant and sponsor having travelled together over a substantial period of time and had drawn an unfair conclusion that the sponsor had abandoned the appellants when that was not the case. Findings were made on evidence which had not been tested by relevant examination and a proper explanation could have been given as to why the sponsor had not visited the appellants in Belgium, if the judge had explored the matter more. Reliance was placed upon the case of GM (Sri Lanka) v The Secretary of State for the Home Department (Rev 1) [2019] EWCA Civ 1630 in that regard which Mr Flaherty submitted involved similar circumstances. Mr Flaherty submitted that the decision was unfair and wrong, that the judge had erred in his assessment of proportionality and the best interests of the child and that the judge had failed to weigh relevant matters in the balance.

10. Mr Tan submitted that it had been entirely open to the judge to conclude that the document referred to at [18(e)] was not sufficient to show that the exception to the age of marriage was met. There was no error of fact and no misunderstanding by the judge. Neither, he submitted, was there a failure to consider relevant documentary evidence (namely a report entitled "Temarapport" Sudan Marriages for the Eritrean and Ethiopian Diaspora in Khartoum") when that evidence had not been before him. With regard to the document referred to at [13] of the judge's decision entitled "Marriage Law in Eritrea: Types and Methods of Proof", Mr Tan submitted that section 4 of the article referred to the NCCE (new Civil Code of Eritrea) making no reference to such a marriage conducted outside Eritrea being valid. The appellants could not succeed under the immigration rules in any event, because the marriage took place after the sponsor left Eritrea and Israel. The judge was entitled to find that the marriage was not genuine and subsisting for the reasons set out at [14] which had not been challenged in the grounds.

11. In response, Mr Flaherty reiterated the points previously made and submitted again that, on the evidence before the Tribunal, it was an error for the judge to find that the marriage was not valid.

Discussion

12. With regard to the first ground, it seems to me that that is little more than a disagreement with the findings reached by the judge on the documentary evidence before him in relation to the question of the validity of the appellant's marriage. The judge plainly had full and careful regard to the document relied upon by the appellant, namely the report entitled "Marriage Law in Eritrea: Types and Methods of Proof" dated 24 June 2018, and he set out the relevant part in full at [13] of his decision. Paragraph 2.1 of that article was relied upon to demonstrate that there were exceptions to the requirement under the NCCE for the parties to a lawful marriage being 18 years of age, namely "with the consent of the minor and his guardian". However, whilst the appellant asserts

that the document set out at [18(e)] of the judge's decision was sufficient to show that such consent was given, I have to agree with Mr Tan that the judge was perfectly entitled to conclude that a document drafted some two and a half years after the marriage was not a contemporaneous statement of the parties' parents giving their consent and, further, that the wording of the document was in any event not sufficiently clear to show that consent was given at the time, such that the exception did not apply.

13. As to the question of a requirement to register the marriage in Sudan, the grounds essentially attempt to re-argue the matter on the basis of further evidence which was not before the judge. The grounds refer at [8] to a report "Temarapport: Sudan Marriages for the Eritrean and Ethiopian Diaspora in Khartoum" and assert that the judge erred by failing to consider it, but it does not appear that the report was produced for the hearing. Mr Tan put the appellant on notice, in the Rule 24 response, that that was the case, but Mr Flaherty had no further information and agreed that it did not appear to be the case that the judge was provided with it. In any event, as Mr Tan submitted, the report at section 4 does not assist the appellant, as it states that the NCCE makes no reference to the validity of a religious or customary marriage celebrated outside of Eritrea.

14. Accordingly, I agree with Mr Tan that the judge was fully and properly entitled to conclude that the evidence did not demonstrate that the appellant's and sponsor's marriage was a valid one. The findings and conclusions at [18(f)] and [18(g)] were entirely open to the judge and there was no misunderstanding of the evidence or mistake of fact. The grounds simply disagree with his conclusions on the evidence.

15. In any event, as Mr Tan submitted, the challenge to the judge's conclusion that the appellant could not meet the requirements of the immigration rules did not address the requirement in paragraph 352A(iii), that: "*the marriage or civil partnership did not take place after the person granted refugee status left the country of their former habitual residence in order to seek asylum or the parties have been living together in a relationship akin to marriage or a civil partnership which has subsisted for two years or more before the person granted refugee status left the country of their former habitual residence in order to seek asylum*". That was addressed by the judge briefly at [18(h)] and [18(l)], but the grounds at [11] to [14] do not properly respond to that or suggest how the requirements of paragraph 352A(iii) had been shown to have been met, when the evidence was that the relationship commenced, and the marriage took place, after the sponsor had left Eritrea and Israel. The judge therefore properly concluded that the requirements of paragraph 352A could not be met. The same applies to the requirements of paragraph 352D(iv), for the same reasons.

16. As for the judge's findings on the genuine and subsisting nature of the relationship between the appellant and the sponsor, again the challenge is being made on the basis of evidence which was not before the judge. Mr Flaherty submitted that the judge had erred by making findings on matters not

tested in evidence and ought to have explored the matter of the sponsor's commitment to the relationship. However it was not the judge's role to question the sponsor at length, particularly when the appellant was legally represented at the hearing. It was for the appellant's representative to examine the sponsor about his reasons for leaving Belgium and not returning to visit his wife, but it seems that she did not do so and indeed it seems that she provided the Tribunal with incorrect information in her skeleton argument, submitting at [9] that the appellant had no status in Belgium, whereas the judge pointed out at [14(j)] that the sponsor's evidence was that she had refugee status in Belgium. Mr Flaherty referred in addition to the fact that the sponsor had attempted to travel to Belgium in February 2022, but that was after the judge's decision and there was no evidence before the judge to show that he had made any attempt to visit her at the time of the hearing. Whilst the judge could perhaps have better expressed himself when referring at [18(h)] to the sponsor's "callous treatment" of his wife, I reject the assertion in the grounds at [14] that his findings were unsubstantiated. As Mr Tan submitted, the judge's finding at [18(h)] was informed by his observations and findings at [14], none of which were challenged in the grounds. Accordingly it seems to me that the judge was perfectly entitled to conclude as he did on the basis of the evidence before him. As Mr Tan submitted, those adverse findings clearly informed the judge's Article 8 assessment and, whilst his findings on Article 8 were somewhat limited, it is clear that, in light of the detailed findings he otherwise made, he conducted a perfectly adequate balancing exercise and proportionality assessment and a perfectly adequate assessment of the best interests of the second appellant.

17. In the circumstances, and for all of these reasons, considering the limits of the evidence that Judge Herwald had before him, it was open to him to reach the conclusions that he did. He did not make any errors of law in his decision. I therefore uphold his decision.

DECISION

18. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Anonymity

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 25 July 2022