Upper Tribunal
(Immigration and Asylum Chamber)

Fetle (Partners: two year requirement) [2014] UKUT 00267 (IAC)

THE IMMIGRATION ACTS

Heard at Glasgow	**Promulgated on**
On 7 March 2014	
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Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

SENAYT OKUBAY FETLE

Appellant

and

THE ENTRY CLEARANCE OFFICER, NAIROBI

Respondent

Representation:

For the Appellant: Mr Winter, Advocate, instructed by Peter G Farrell Solicitors
For the Respondent: Mr Parkinson, Senior Home Office Presenting Officer

In contrast to the requirement of para GEN 1.2(iv) of Appendix FM, a requirement (such as in paragraph 352AA of the Immigration Rules) that "parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more" does not require two years cohabitation, but two years subsistence of the relationship. Whether the relationship still subsists, as required by the tense of that requirement and as may be separately required, is a different issue.

DETERMINATION AND REASONS

1. The appellant is a national of Eritrea. She applied to the respondent for entry clearance to enable her to settle in the United Kingdom as the wife of a refugee, her

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sponsor, Amanuel Fassil. Her application was refused on 10 April 2012, she appealed to the First-tier Tribunal on the basis that the decision was wrong in its application of the Immigration Rules, and that it breached her entitlement under Article 8 of the ECHR. At the hearing on 22 July 2013, First-tier Tribunal Judge Quigley was told that the appellant now accepted that she could not meet the requirements of the Rules under which she had applied, because her claimed marriage to the sponsor had not been registered and she could not therefore be regarded as his wife. She claimed that she should instead have been found to meet the requirements of paragraph 352AA of the Statement of Changes in Immigration Rules, HC 395 (as amended), as a partner of the sponsor. The judge heard the appeal on that basis. She found that the appellant did not meet the requirements of paragraph 352AA. She found also that there were a number of discrepancies between the appellant's and the sponsor's accounts of certain matters, and that there was very limited evidence of contact between them. She concluded that the relationship between the appellant and the sponsor was not a genuine and subsisting one. She accordingly found that the refusal of entry clearance to the sponsor was not a disproportionate interference in family life. She dismissed the appeal. The appellant now has permission to appeal to this Tribunal.

2. The appellant and the sponsor claim to have been through a marriage ceremony on 16 July 2006, having presumably met some time before that. The clear evidence was that they had not lived together before that date. The sponsor left Eritrea in March 2008. The judge found that there was "little or no evidence of any contact between the appellant and the sponsor since he left Eritrea in 2008".

3. The sponsor had male twins, born to another woman (not the appellant) on 3 June 1995. One of them died in 2012. In the appellant's visa application form she stated that the sponsor did not have any children. She also stated, in a different part of the form, that she herself did not have any children. The judge considered the explanations given for the discrepancy between the sponsor's evidence that he had children and the appellant's statement that he did not: she rejected those explanations and found that:

> "There is a clear discrepancy between the evidence of the appellant and that of the sponsor on a matter of fundamental importance. It seems to me that the fact that the appellant was unaware that the sponsor had two children does suggest to me that their relationship is not subsisting and genuine. The fact of the matter is that the application was made and the form signed on 10 February 2012, almost six years after the date when the sponsor claims he and the appellant started living together on 16 July 2006".

4. The judge also had concerns about some of the documentation presented to her. She accepted that the sponsor had travelled to Entebbe in September 2011, but noted that other than their own evidence, there was nothing to show that the appellant and the sponsor had spent any time together then. (Indeed the evidence before the judge was that the sponsor arrived in Entebbe very late at night on 20 September 2011 and stayed until 27 September 2011, but the appellant said that she had last seen the

sponsor on 20 September 2011.) Although there was documentation evidencing payment by the sponsor to the appellant, these all post-dated that visit.

5. Before the judge there were four witnesses on the appellant's side: the sponsor and three other men, each of whom gave evidence that they knew the sponsor and had visited him and the appellant in the matrimonial home soon after the ceremony of marriage. All these men were able to give the names of the sponsor's twin boys: one (but only one) was able to give the name of the sponsor's previous partner, their mother. In her determination the judge noted that these four witnesses had given oral evidence and been cross-examined, but not re-examined. She did not specifically record either her view of the evidence given by the witnesses other than the sponsor, or its impact on her decision.

6. The grounds of appeal, as presented by Mr Winter, raise two specific issues. The first relates to the interpretation of the relevant Immigration Rules; the second asserts that the judge's failure to deal fully with the witness's evidence made her decision erroneous in law.

7. Paragraph 352AA of the Immigration Rules sets out "the requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the unmarried or the same-sex partner of a refugee". The requirements include the following:

> "(ii) the parties have been living together in a relationship akin to either a marriage or a civil partnership which has subsisted for two years or more; and
>
> …
>
> (v) each of the parties intends to live permanently with the other as his or her unmarried or same sex partner and the relationship is subsisting".

8. In the present case the relationship between the appellant and the sponsor is said to be that which began with the marriage on 16 July 2006, continued up to the date of the decision, and continues still. The sponsor's evidence makes it clear that the appellant and the sponsor did not live together for two years: he left Eritrea less than two years after the date of the ceremony of marriage. Mr Winter's submission (which was also made by the appellant's representative before the First-tier Tribunal Judge) is that paragraph 352AA(ii) does not require two years' cohabitation: it requires (a) a relationship of more than two years' duration; and (b) living together in that relationship. Mr Winter pointed out that the same wording appears elsewhere in the Immigration Rules, for example in paragraphs 295A(b)(i) and 295D(vi); but he did not point to any decisions on the meaning of the phrase. Mr Parkinson's submission was that the ordinary meaning of the phrase is that the parties should have lived together for the specified period.

9. The matter is not free from doubt, but we prefer Mr Winter's submissions. The insertion of the words "which has subsisted" before the specification of the period seems to us crucially to separate the specified period from the requirement to have "lived together". The "subsistence" of the relationship is an additional requirement in this subparagraph and later in the Rules, so it does not need to appear in this part

of the rule save for the purpose of clarifying what it is that has to have happened for the specified period. There may, we remind ourselves, be a number of reasons why a couple, whether married or unmarried, do not in fact live together: the demands of employment maybe such a reason; so may a need to flee the country. Such factors do not necessarily destroy a relationship, which may continue to subsist despite the separation. A relationship said to be akin to marriage, but in which the cohabitation has been minimal, may not be able to be established as "subsisting", so there is no danger of our interpretation leading to a view that (for example) one night's cohabitation would be enough to claim entitlement under the Rules. It is to be noted that the requirement under Appendix FM to the Immigration Rules is different, and does impose the requirement adumbrated by Mr Parkinson. In the Definitions section, GEN 1.2 provides that:

> For the purposes of this Appendix 'partner' means –
> (i) the applicant's spouse;
> (ii) the applicant's civil partner;
> (iii) the applicant's fiancé(e) or proposed civil partner; or
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless the context otherwise requires.

10. For this reason, we think that the judge was wrong to say that, because the appellant and the sponsor had lived together for less than two years, the appellant could not meet the requirements of paragraph 352AA. That, however, is not necessarily material to the outcome of the appeal: because, as we have said, the judge in addition found that the relationship was not a subsisting one. The requirement that the relationship be a subsisting one at the date of the decision appears in two places: obviously in subparagraph (v) and more subtly in the tense "have" in subparagraph (ii).

11. We have noted above what the judge had said about the evidence going to the relationship. It is true, and perhaps regrettable, that the judge expressed no clear view on the evidence of the three witnesses who accompanied the sponsor. But, other than indicating that shortly after the marriage ceremony the appellant and the sponsor could be found together, they did not purport to say anything about the nature of the relationship between the appellant and the sponsor. In our judgment, they added little or nothing to the evidence of whether the relationship between the appellant and the sponsor was a subsisting one either when the sponsor left Eritrea in 2008, or when the application for entry clearance was made, or when it was decided. As the judge noted, the evidence that the relationship was subsisting at the date of the decision was very sparse indeed, and it does not appear to us that there is any proper basis for saying that the judge's decision on that issue was legally flawed.

12. As we have said, Mr Winter also argued the case on Article 8 grounds. The position, however, is that the relationship between the appellant and the sponsor at the date of the decision has not been shown to be what they claim it was. In these circumstances there is no basis of credible evidence upon which it can properly be said that the

maintenance of the status quo by refusing the appellant entry clearance is a disproportionate infringement of the right to family life of either the appellant or the sponsor.

13. For the foregoing reasons we dismiss this appeal.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 19 May 2014