



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/13819/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 8 September 2020

On 10 September 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Siwar Hamdoush

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms F Shaw, instructed by Central England Law Centre

For the Respondent: Mr M Diwnycz, Senior Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion

of the hearing I announced my decision and gave oral reasons, reserving the full reasons to be provided in writing, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Syrian national born on 2.1.94, has appealed to the Upper Tribunal with permission against the decision of the First-tier Tribunal promulgated 2.4.20, dismissing her human rights appeal against the decision of the Entry Clearance Officer, dated 1.8.19 and maintained in the Entry Clearance Manager Review of 19.9.19, to refuse entry clearance to the UK as the spouse of Hussein Salah Mahmood (the sponsor), a person granted refugee status in the UK, pursuant to paragraph 352A of the Immigration Rules.
2. The application was refused because the Entry Clearance Officer was not satisfied that the appellant was married to the sponsor as claimed, as he had allegedly made a formal declaration on 28.8.19 that he was single. In the circumstances, the Entry Clearance Officer was not satisfied that the appellant and the sponsor were in a genuine and subsisting relationship.
3. Paragraph 352A provides as follows:

“Family Reunion Requirements for leave to enter or remain as the partner of a refugee

352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the partner of a person granted refugee status are that:

- (i) the applicant is the partner of a person who currently has refugee status granted under the Immigration Rules in the United Kingdom; and*
- (ii) 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; and*
- (iii) the relationship existed before the person granted refugee status left the country of their former habitual residence in order to seek asylum; and*
- (iv) the applicant would not be excluded from protection by virtue of paragraph 334(iii) or (iv) of these Rules or Article 1F of the Refugee Convention if they were to seek asylum in their own right; and*
- (v) each of the parties intends to live permanently with the other as their partner and the relationship is genuine and subsisting*
- (vi) the applicant and their partner must not be within the prohibited degree of relationship; and*
- (vii) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity.”*

4. The First-tier Tribunal made findings which can be summarised as follows:
 - a. The appellant and the sponsor separately fled Syria to the IKR of Iraq;
 - b. They first met in Iraq and were subsequently married there on 1.8.18;

- c. They lived together as husband and wife in Iraq between 1.8.18 and when the appellant came to the UK with his family on 11.3.19;
 - d. The appellant and the sponsor are in a genuine and subsisting relationship;
 - e. The sponsor was habitually resident in Iraq, not Syria, when registered under the UNHCR resettlement scheme on 17.9.14;
 - f. The sponsor was recognised as a refugee whilst in Iraq, not the UK, under the VPR Scheme operated by the UNHCR;
 - g. The sponsor did not make a declaration of being single on 28.8.19, as that post-dates the refusal decision. The declaration was in fact made on 28.8.16, when interviewed by the UNHCR, at which time the sponsor correctly declared himself to be single;
5. On the basis of the above findings, the judge concluded that the appellant could not meet the requirements of paragraph 352A, as the sponsor could not be said to have been granted refugee status under the UK Immigration Rules. Further, that the marriage took place after the grant of refugee status in Iraq in 2014, and although the marriage took place before the sponsor left Iraq, he did not do so “in order to seek asylum.”
6. The grounds argued that the judge erred in law by:
- a. Making a material error in finding that Appendix FM would be met;
 - b. Making a material error in assuming that the appellant would be admitted to the UK under the Syrian VPRS;
 - c. Making a material error as to when and in which country the sponsor was granted refugee status;
 - d. Making a flawed or incomplete assessment as to whether exceptional circumstances exist;
7. Permission was granted by Designated First-tier Tribunal Judge McClure on 11.6.20, on the basis that it was arguable that the sponsor’s status in the UK is as a refugee and that the judge has misunderstood the evidence in respect thereof. “The sponsor was habitually resident in Syria and in coming to the UK was coming to seek refugee status. It is arguable that the sponsor was not recognised as a refugee in Iraq, it is arguable that the judge has failed to apply the requirements of paragraph 352A properly.”
8. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. I have also taken into account Ms Shaw’s skeleton argument, dated 6.9.20.
9. For the reasons set out below, I find that no error of law is disclosed by either of the first two grounds.
10. Contrary to the assertion in the first ground, the judge did not make a finding that Appendix FM would be met but stated that “*As long as the appellant and UK sponsor*

are able to meet the requirements of Appendix FM of the Rules, I can see no reason why the appellant would not be granted entry clearance.” It was not required of the judge to make an assessment as to whether Appendix FM would be met. It was the respondent’s contention at the First-tier Tribunal appeal hearing that the appellant should have made an application under Appendix FM rather than 352A. It was not material whether or not the appellant could succeed under Appendix FM, but it was relevant that there was a route for reunion under those provisions. It would be a matter for the appellant and her sponsoring husband to demonstrate whether they could meet the requirements. None of this discloses any error of law.

11. Similarly, no error of law is disclosed in the second ground where the judge speculated that the appellant would be able to apply under the VPRS to settle with her husband. The grounds complained that the judge failed to properly explore this. However, the judge’s remark was incidental to the decision and not material to the outcome of the appeal.
12. In the light of my findings in relation to the third ground, set out below, Ms Shaw did not seek to pursue the first, second or third grounds.
13. For the reasons set out below, taking into account the submissions on behalf of the appellant, I am satisfied that the judge erred in finding the appellant could not meet the requirements of paragraph 352A. The error arises from the judge’s conclusion that the sponsor was granted refugee status in Iraq and not the UK.
14. On the information now before me, it appears clear that the sponsor’s registration with the UNHCR’s VPRS in Iraq was not the grant of refugee status but merely registration as an asylum-seeker. I am satisfied that the sponsor was granted refugee status only after entering the UK, which would be consistent the statement of the then Home Secretary in March 2017, to the effect that those arriving through the Syrian VPRS “are granted Humanitarian Protection and five years’ limited leave to remain.” It’s not entirely clear whether the grant of refugee status was under the Immigration Rules, but it was not argued to the contrary before me. It follows that 352A(i) is met.
15. The requirement of 352A(ii) is that the marriage did not take place after the sponsor left the country of his former habitual residence in order to seek asylum. The First-tier Tribunal Judge relied on Nessa v Chief Adjudication Officer and another [1999] UKHL 41, to consider that if the term ‘habitual residence’ is to be interpreted in accordance with the normal use and meaning of the words as “*residence in a place with some degree of continuity and apart from accidental or temporary absences*”, then the appellant and the sponsor were habitually resident in Iraq and not Syria.
16. Given the error as to when and where the sponsor was granted refugee status, the judge was also wrong to conclude that 352A(ii) could not be met on the basis that the sponsor did not leave Iraq “*in order to seek asylum*”. If, however, the sponsor’s country of former habitual residence is Syria, then neither 352A(ii) nor 352A(iii) can be met, as the marriage took place after he left Syria and did not exist before he left Syria.

The appellant's case was that Iraq was the country of former habitual residence and that was the finding of the First-tier Tribunal.

17. Mr Diwnycz did not seek to argue that refugee status was granted in Iraq, nor that the relevant place of habitual residence was Syria, rather than Iraq.
18. It follows that the judge materially erred in law in finding that the appellant and the sponsor could not meet all the requirements of paragraph 352A of the Immigration Rules. I am satisfied on the information now before the Tribunal that the appellant does meet the requirements of the Rules.
19. It is also to be noted that the only Rules reason for refusal of the entry clearance application cited in the refusal decision and Entry Clearance Manager Review was that the relationship of marriage was not accepted. The respondent did not rely on issues as to where and when refugee status was granted. The rejection of the relationship arises out of a misunderstanding on the part of the respondent as to when the sponsor made a formal declaration that his marital status was single. I find it could not have been made on 28.8.19, as the decision refusing the application was made on 1.8.19. The correct year must have been 2016.
20. Whilst the only right of appeal to the First-tier Tribunal is on human rights grounds and the judge could not allow the appeal under the Rules, it is highly relevant to the article 8 ECHR proportionality balancing exercise that on a correct understanding of the facts of this case, the appellant met the requirements of paragraph 352A and did not need to apply under Appendix FM. In the circumstances, there would have to be strong countervailing public interest considerations to find the respondent's decision proportionate. On the facts of this case, it is clear and I find that the decision was disproportionate.
21. In the circumstances and for the reasons set out above, I find material error of law in the decision of the First-tier Tribunal so that it must be set aside and remade. On my findings, the appellant meets the requirements of 352A.

Decision

The appeal of the appellant to the Upper Tribunal is allowed;

I set aside the decision of the First-tier Tribunal and remake the decision by allowing it;

I make no order for costs.

I make no anonymity direction.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 8 September 2020