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Heard at Field House

AA (Marriage _ Country of Nationality) Somalia [2004] UKIAT 00031

Date: 20 January 2004

**IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

24 February 2004

**Before :**

**Mr G Warr (Chairman)**
**P R Lane**

**Between**

**APPELLANT**

**And**

**Entry Clearance Officer – Pretoria**

**RESPONDENT**

Appearances:

For the appellant: Mr M Schwenk, Counsel, instructed by South Manchester Law Centre.
For the respondent: Mr J Wyatt, Senior Home Office Presenting Officer.

## DETERMINATION AND REASONS

1. This determination is being reported because it concerns the interpretation of paragraph 352A of the Immigration Rules. The Tribunal finds that, where a person ('A') leaves the country of her nationality and subsequently marries a man ('B') in another country where A has become habitually resident, B is not precluded from relying upon paragraph 352A

in order to join A in the United Kingdom by reason only of the fact that the country in which A and B were married is not the country of A's nationality, in relation to which she has been recognised by the United Kingdom as a refugee.

2. The appellant, a citizen of Somalia who is currently residing in South Africa, appeals with permission against the determination of an Adjudicator, Dr O T C Ransley, sitting in Salford, in which she dismissed the appellant's appeal against the decision of the Entry Clearance Officer, Pretoria, to refuse to grant him entry clearance to the United Kingdom as the spouse of Mrs Fatima Munya, who had been granted refugee status in this country.

3. Although the explanatory statement refers to the application being refused under paragraph 281(v) of the Immigration Rules, it is clear from the paragraph which appears under the heading "Background Information" that the Entry Clearance Officer impliedly rejected the application by reference to paragraph 352A of those Rules.

4. As in force at the time of the decision, rule 352A read as follows:

> "352A. The requirements to be met by a person seeking leave to enter or remain in the United Kingdom as the spouse of a refugee are that:
>
> i) the applicant is married to a person granted asylum in the United Kingdom; and
>
> ii) the marriage did not take place after the person granted asylum left the country of his former habitual residence in order to seek asylum; and
>
> iii) the applicant would not be excluded from protection by virtue of Article 1F of the United Nations Convention and Protocol relating to the Status of Refugees if he were to seek asylum in his own right; and
>
> iv) if seeking leave to enter, the applicant holds a valid United Kingdom entry clearance for entry in this capacity".

5. The reason why paragraph 352A must in practice have been considered by the Entry Clearance Officer is that the sponsor is undoubtedly a recognised refugee in the United Kingdom. The paragraph under the heading "Background Information" contains the following sentences:-

> "The information received from the Home Office after the appellant's interview confirms that the appellant and sponsor had met and married in Ethiopia after the sponsor had fled Somalia to ultimately seek asylum in the UK. The appellant's application was therefore treated as a settlement application from the spouse of a person present and settled in the UK. The appellant was asked to attend a further interview in order to clarify the relationship between himself and the sponsor, and the ability of the appellant and sponsor to maintain and accommodate themselves in the UK without recourse to public funds."

6. The Entry Clearance Officer refused the application, by reference to paragraph 281, because he was not satisfied that the parties could maintain and accommodate themselves without recourse to such funds.

7. The grounds of appeal to the Tribunal do not take issue with the finding in relation to paragraph 281. Instead, they contend that the Adjudicator was wrong to find that, in the circumstances of this case, the appellant failed to bring himself within paragraph 352A which, as can be seen, contains no maintenance and accommodation requirement.

8. According to the interview record of the sponsor, undertaken by the Home Office in connection (it would seem) with the sponsor's claim for asylum in the United Kingdom, the sponsor fled Somalia for Ethiopia in 1997. The sponsor's interview record (prepared by the Entry Clearance Officer) states that he had moved to Ethiopia from Somalia in 1991. The appellant told the Entry Clearance Officer that the sponsor arrived there in 1993. As the Adjudicator noted, that is plainly inconsistent with what the sponsor told the Home Office.

9. The appellant told the Entry Clearance Officer that he married the sponsor on 25 June 1999 in Ethiopia. In relation to this matter, the Adjudicator has this to say at paragraph 5 of her determination:

> "…. The explanatory statement recorded that no evidence of the marriage was before the ECO. However, it would appear that the respondent decided not to challenge the appellant's claim that he had married the sponsor in June 1999 in Ethiopia following the ECO's communication with the Home Office. The nature and contents of such communication was not before me".

10. According to the appellant's interview record, she lived with friends in Ethiopia from her arrival there until she left for the

United Kingdom in 2000. Given that the fact of the marriage has been accepted by the respondent in this case, we assume (and there is no evidence to contradict this) that, from the date of the marriage in 1999 until 2000, the parties lived together where the sponsor had been residing prior to her marriage, namely, with the family in Ethiopia whom she knew.

11. The sponsor said that she felt that she did not want to live in Ethiopia because she had nothing there. Accordingly, her husband collected some money and made arrangements with an agent for the sponsor to be taken abroad. There was not enough money for both to travel together.

12. There is little information as to the circumstances in which the sponsor claimed, and was granted, asylum in the United Kingdom, save that there is before us a copy of a letter dated 30 July 2000 from the Home Office to the sponsor, stating that she has "been granted indefinite leave to enter the United Kingdom as a refugee recognised under the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. This means that you are free to stay in this country permanently".

13. After the departure of the sponsor for the United Kingdom, the appellant appears to have lived in a refugee camp in Ethiopia but the time came when "the refugee agency could not help us any more so we left" (first interview, question 16). The appellant travelled directly to South Africa, arriving there in July 2001.

14. According to the answer to question 5 of that interview, the appellant considers himself to be a "refugee" in South Africa. He is, however, not legally permitted to work, although he buys and sells goods, as a way of surviving (questions 28 and 29).

15. The essential question in this case is whether, on the facts, the appellant has satisfied the requirement of paragraph 352A(ii) of the Immigration Rules, that his marriage to the sponsor did not take place after "the person granted asylum" [i.e. the sponsor] "left the country of [her] former habitual residence in order to seek asylum".

16. It is clear from paragraph 6 of the determination that the Adjudicator found against the appellant on this question because, in the Adjudicator's view, "the meaning and the intention of paragraph 352A(ii) is clear: the wording 'former habitual residence' clearly means *the country from which the asylum seeker was fleeing persecution in order to seek asylum*. In my opinion although the person must be granted asylum in the UK in order for paragraph 352A(ii) to operate

the wording 'left the country of his/her former habitual residence in order to seek asylum' is not restricted to seeking asylum in the UK. The implication is that the asylum seeker could seek asylum in any country outside of the country of his former habitual residence from which he/she flees persecution" (adjudicator's emphases).

17. On this construction of the provision, the Adjudicator found that, since the marriage occurred after the sponsor "had left Somalia (the country of her former habitual residence) to go to Ethiopia in 1997 in order to seek asylum", the appellant could not satisfy the requirements of paragraph 352A.

18. For the appellant, Mr Schwenk submitted that the Adjudicator's construction of paragraph 352A(ii) was too narrow. She failed to have regard to the background to the rule, and the latter's underlying purpose.

19. As Mr Schwenk indicated, the origin of rule 352A lies in the Final Act of the United Nations Conference on the Status of Refugees and Stateless Persons. As set out at Annex I of the UNHCR Handbook, the Conference, considering that the family was "the natural and fundamental group of society" and that unity of the family was "an essential right of the refugee" recommended that Governments... take the necessary measures for the protection of a refugee's family, especially with a view to ... ensuring 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".

20. Prior to the coming into force of paragraph 352A (and the associated paragraphs 352B to F) of the Immigration Rules, the Government of the United Kingdom had sought to give effect to the recommendation of the Conference, by means of policy statements.

21. In ***Gasmelsid*** (TH/20767/95), a determination of the Tribunal in 1996, the question at issue was whether a particular statement of the Secretary of State, made in connection with Somali family reunion, entitled Ms Gasmelsid to enter the United Kingdom to join her spouse, notwithstanding that the marriage occurred by proxy, over two years after the spouse had been recognised in the United Kingdom as a refugee. The fact that the Tribunal in that case decided that Ms Gasmelsid was able to take advantage of particular statements of the Secretary of State does not, of itself, assist the appellant in the present case. The point sought to be made by Mr Schwenk, however, is that in both ***Gasmelsid*** and the later case of ***Qurash Shah*** [2002] UKIAT 03389, it was, in effect, taken for granted that a refugee in the United Kingdom is

entitled under the relevant policies then pertaining to reunite in the United Kingdom with a spouse whom the refugee has married prior to being recognised as a refugee.

22. In ***Gasmelsid***, although the Secretary of State sought to resile from certain statements that the Tribunal found were determinative of the actual issue before them, his representative in that case nevertheless relied upon a letter of 17 May 1999 which set out the Secretary of State's policy as follows:-

> "If the UK sponsor has been recognised as a refugee... we follow the policy on family reunion agreed by the Conference which adopted the Convention. We will agree to the admission of the spouse and minor children of a refugee."

23. In ***Qurash Shah***, the Tribunal, at paragraph 15 of its determination, categorised the policy in question as one "to allow the existing family of a person granted asylum to join him but as regards later marriages he will have to meet the same standards as any other lawful resident of the United Kingdom". In the following paragraph, the Tribunal said that "it is only an existing spouse at the time a person is granted asylum status who can enter without consideration of maintenance or housing."

24. In the grounds of appeal to the Tribunal in the present case, it is stated that, prior to the coming into force of paragraph 352A *et seq* "a spouse or minor child of a refugee was admitted to the United Kingdom without the need for the refugee being able to show that they could be maintained and accommodated without recourse to public funds as a matter of practice". Reference is made to the Fourth Edition of *MacDonald's Immigration Law and Practice* at paragraphs 12.120 to 12.121.

25. The grounds of appeal also attach a copy of an undated letter from Tony Mercer of UK Visas to Mr Scammel of the Immigration Law Practitioners Association, said to have been written around 15 May 2002. This states that:-

> "As the Rules now stand, only those applicants who fall within the definition of paragraphs 352A-D are entitled to family reunion as defined by the UK Government for the purposes of the Final Act of Conference. Essentially this means the pre-existing spouse and minor children of a recognised refugee".

The letter then goes on to contrast this group of persons with "all other applicants that claim to be dependents of UK-

recognised refugees". These "are dealt with under the other relevant provisions of the rules. This, as you will realise, includes the spouses of refugees who married after they were recognised as refugees in the UK and other family members not included in previously mentioned categories".

26. Although the reason for the letter being written appears to have been some question regarding the classes of cases in respect of which fees are charged for visa applications, the appellant seeks to rely upon it as a further indication that, so far as spouses of refugees are concerned, the Secretary of State regards the question as turning on whether the marriage occurred before or after recognition of refugee status by the United Kingdom Government.

27. On 17 September 2002 the Entry Clearance Officer, Pretoria, wrote to the South Manchester Law Centre regarding the appellant's actual application. In that letter, the Entry Clearance Officer had this to say:-

> "To qualify for settlement in the United Kingdom under the family reunion scheme, Paragraph 352A(ii) of the Immigration Rules clearly states: 'the marriage did not take place after the person granted asylum left the country of his/her former habitual residence in order to seek asylum'. The ECO who dealt with [the appellant's] application was not satisfied that Ethiopia was the 'country of his/her habitual residence' for either [the appellant or the sponsor] therefore the application fell to be decided under the normal settlement rules. The ECO who finally made a decision on this case was not satisfied that [the appellant] met the requirements of the rules and therefore refused the application."

28. In the present case, the Adjudicator did not make a finding on whether the sponsor had in practice been habitually resident in Ethiopia. This was because, as paragraph 6 of the determination indicates, she found that, for the purposes of paragraph 352A, the words "former habitual residence" in sub-paragraph (ii) could only mean "the country from which the asylum seeker was fleeing persecution in order to seek asylum".

29. It is certainly curious why paragraph 352A(ii) has been drafted in the precise way it has. If, at the time of drafting, the Secretary of State's policy was indeed to permit the reunion of a married couple whose marriage had taken place before the date when the refugee spouse had been recognised as such in the United Kingdom, it would have been perfectly easy to say as much in the new rule. On the other hand, the Adjudicator's interpretation of the provision is, in our view, not sustainable.

Having regard to the purpose underlying the recommendation of the Final Act of Conference, there is no justification for construing the provision in so narrow a manner.

30. Indeed, the Adjudicator's approach involves making an unwarranted distinction between, on the one hand, the concept of seeking, and being granted, "asylum" and, on the other, seeking a safe place of refuge. One of the key features of the 1951 Geneva Convention is the obligation it places upon Contracting States to recognise the status of a person as a refugee and to accord that person various rights, as a consequence of that recognition. In paragraph 352A(i), there can in our view be no doubt but that "a person granted asylum in the United Kingdom" is a person who has been formally recognised as a refugee. By the same token, the reference in paragraph 352A(ii) to "the person granted asylum" is, quite obviously, a reference to that self same person.

31. The Adjudicator's construction of paragraph 352A(ii), however, involves giving a far wider meaning to the words "in order to seek asylum". Whilst the Tribunal makes no finding upon whether those words must be restricted to seeking asylum in the United Kingdom (since we do not feel we have heard adequate submissions on that matter), the Tribunal can see no reason why the words should be construed as anything other than a reference to the person in question seeking refugee status.

32. According to paragraph 6.63 of the April 2003 Country Assessment on Ethiopia, the law of that country "includes provisions for the granting of refuge and asylum in connection with the provisions of the UN Convention Relating to the Status of Refugees and its 1967 Protocol". There is no dispute that the sponsor, in the present case, never sought and obtained from the Ethiopian Government the formal recognition of herself as a refugee. According to her account, she fled the difficulties she faced in Somalia, by moving to Ethiopia, where she stayed with a family who were known to her. At paragraph 11 of her statement of 26 March 2003, we find her view of the situation in Ethiopia was that “the government there refused to accept anyone from Somalia”.

33. Even the Entry Clearance Officer himself does not appear to have regarded paragraph 352A(ii) as having as narrow an application as that found by the Adjudicator. The passage from his letter of 17 September 2002, which we have quoted above (at paragraph 27), would plainly have been couched in different terms, had he done so.

34. In many cases, the country of a person’s former habitual residence, which he or she leaves in order to seek asylum, will

be the country in which the person granted asylum in the United Kingdom, has a well-founded fear of persecution. If, however, the drafter of paragraph 352A had intended the reference to such a country in sub-paragraph (ii) to be so confined, it would have been an easy matter to have said so.

35. We put to Mr Schwenk the following point. If paragraph 352A(ii) falls to be construed so as to permit the appellant in the present case to succeed if he can show that his wife was habitually resident in Ethiopia, before coming to the United Kingdom, a potential anomaly arises. On the face of it, there would seem to be no good reason why a couple who flee persecution in country X, and who marry in country Y in circumstances where their situation in country Y is so temporary and/or precarious as to prevent them from being habitually resident there, should be excluded from the benefit of paragraph 352A. Mr Schwenk's response was, in effect, to the effect that the existence of such a potentially anomalous situation should not lead the Tribunal to adopt a construction of paragraph 352A(ii) which removes from its ambit even more cases of a meritorious nature, thereby taking paragraph 352A even further from the spirit and intent of the recommendation of the Final Act of the 1951 Conference. The Tribunal agrees.

36. However, even on this construction of paragraph 352A, the appellant will only succeed if he can show on balance that the sponsor was habitually resident in Ethiopia. Mr Schwenk relied upon the House of Lords' opinions in ***Nessa v Chief Adjudication Officer*** [1998] No.2 All ER 728. In that case, whilst not coming to the conclusion that "ordinary residence" and "habitual residence" were synonymous, their Lordships found that there was a degree of overlap and that the common core of meaning between the two expressions made it relevant to consider case law decided on the meaning of "ordinary residence". That expression connoted "residence in a place with some degree of continuity and apart from accidental or temporary absences" (see ***Levene v Inland Revenue Commissioners*** [1928] AC 217, 225). In **Shah *v Barnet London Borough Council*** [1983] 2 AC 309, Lord Scarman held that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration. The House of Lords in **Nessa** remitted the matter to be decided on a proper basis by the relevant Tribunal. In doing so, they accepted that "an appreciable period" of residence, such as to establish habitual residence, may be as short as a month (see *MacDonald's Immigration Law and Practice*, fifth edition, paras. 5.14 and 13.21).

37. At paragraph 4 of her determination, the Adjudicator doubted whether the appellant and the sponsor had known each other in Somalia, to the extent claimed. The reasons she gives for her doubts in this regard are cogent ones. She does not, however, find that the parties were in truth not married in Ethiopia, nor that they never lived together as husband and wife thereafter. The most that she could be said to find in this regard is that there were serious doubts that the appellant has a "close relationship" with the sponsor (determination paragraph 4). Reading paragraph 10 of the determination, it is apparent that the Adjudicator, whilst doubting that the relationship between the parties was as close as that claimed, specifically did not find that the marriage was not a genuine one.

38. The uncontested evidence in this case is that the sponsor lived in Ethiopia between 1997 and 2000. She lived in the household of a Somali family. In 1999, she married the appellant. He ran a business, trading in goods between Somalia and Ethiopia. Although life in Ethiopia was plainly difficult, there is no suggestion that the Ethiopian authorities regarded the sponsor's presence in that country as unauthorised. In her answer to question 45 of the Home Office interview, "Did you have any problems with the Ethiopian authorities?" She replied, "No. They don't help you but they don't give you any problems either". Her comment about the Ethiopian government not accepting people from Somalia appears to have been in the context of explaining why she took no steps to be formally recognised as a refugee there.

39. Against this factual background, the Tribunal finds that the sponsor was habitually resident in Ethiopia. She left that country in 2000, in order to seek asylum in the United Kingdom. On 30 July 2000, she was granted that status. The marriage in 1999 preceded her departure from Ethiopia. Accordingly, the requirements in paragraph 352A(ii) are met.

40. On 18 September 2002, paragraph 352A was amended. A new sub-paragraph (iv) was inserted, requiring that "each of the parties intends to live permanently with the other as his or her spouse and the marriage is subsisting".

41. The decision in the present case precedes this amendment of paragraph 352A. There is nothing we have been shown that suggests this new requirement is intended to have retrospective effect.

42. Having said this, the Tribunal doubts whether, even before the change, a person could successfully have invoked paragraph 352A if the marriage to the recognised refugee was found to

be a "sham" arrangement or was found to have irretrievably broken down. The intention of the Final Act of the 1951 Conference was, plainly, to encourage the facilitation of the reunion of families of refugees. It is, therefore, a moot point whether the appellant could have succeeded in his application, had the Adjudicator found that there was no intention to carry on any kind of family life with the sponsor in the United Kingdom.

43. In the event, the Tribunal does not have to reach a conclusion on this issue. As is apparent from what we have already said, the Adjudicator in the present case, whilst doubting the closeness of the relationship between the parties, has made no finding to the effect that the marriage was anything other than a genuine one. Nor has she found that the parties have no intention of living together in the United Kingdom.

44. Given that the appellant meets the requirements of paragraph 352A, his appeal falls to be allowed on that basis.

45. This appeal is accordingly allowed.

**P R Lane**
**Vice President**