Upper Tribunal
(Immigration and Asylum Chamber)

Sahebi (Para 352(iii): meaning of "existed") [2019] UKUT 00394 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 September 2019	……

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE D HARRIS

Between

ENTRY CLEARANCE OFFICER

Appellant

and

RASOOL JAN SAHEBI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr P Singh, Senior Home Office Presenting Officer
For the Respondent: Mr I Khan, Solicitor from Lincolns Solicitors

On its true construction, para 352A(iii) of the Immigration Rules is satisfied by showing nothing more than the formal existence of a marriage or civil partnership as at the time of the refugee's departure from his/her country of former habitual residence. In contrast to less formal relationships, there is no requirement to show that the relationship had the qualitative character of it having subsisted at the time of the refugee's departure.

DECISION AND REASONS

Introduction

1. For ease of reference, we shall refer to the Appellant in the proceedings before the Upper Tribunal as the Entry Clearance Officer ("ECO") and the Respondent as the Claimant.

2. This appeal concerns the Family Reunion provisions within the Immigration Rules ("the Rules"), in particular para 352A. The core question for us to grapple with is one of interpretation: does the term "existed" in para 352A(iii) of the Rules mean that an applicant's relationship with the refugee immediately prior to the departure of the latter from their country of former habitual residence had to have the qualitative characteristic of being subsisting?

3. The ECO asserts that the answer to this question is "yes". The Claimant contends that the term denotes a state of affairs without any qualitative constituent. In other words, there is no need to show that the relevant relationship had more than formal content at the time of the refugee's departure.

Background

4. This is an appeal by the ECO against the decision of First-tier Tribunal Judge Gribble ("the judge"), promulgated on 31 May 2019, in which she allowed the Claimant's appeal against the ECO's decision of 4 June 2018, refusing to issue him with entry clearance as the spouse of a refugee recognised in the United Kingdom ("the Sponsor"), pursuant to para 352A of the Rules.

5. The entry clearance application (deemed to constitute a human rights claim) was made on 8 March 2018 and refused on three bases. First, it was not accepted that the Claimant was in fact the husband of the Sponsor. Second, it was noted that the Sponsor, having arrived in the United Kingdom in 2014, made a protection claim which she asserted that the Claimant had assaulted her and, as result, they had separated prior to her departure from Pakistan. The ECO was therefore not satisfied that the marriage was subsisting. Third, the ECO concluded that there were no exceptional circumstances in the case.

The judge's decision

6. Having considered the evidence, the judge made the following findings of fact, none of which are challenged by the ECO:

    1) the Claimant married the Sponsor 1996 and that marriage has never been dissolved;
    2) the Sponsor left Pakistan in 2012 and came to the United Kingdom;
    3) prior to her departure from Pakistan, the Sponsor had been separated and estranged from the Claimant on account of his domestic violence towards her;

4) the Sponsor was, at the time of the Claimant's entry clearance application, a recognised refugee in the United Kingdom, the grant of limited leave to remain as such running from 1 January 2016 to 12 September 2021;
5) as at the date of the application, there had been a genuine reconciliation between the Claimant and the Sponsor, and their relationship was subsisting.

7. On the basis of these findings, at [31] the judge concluded that all the criteria under para 352A of the Rules had been met. In particular, she found that the separation and estrangement had no bearing on para 352A(ii) because the marriage had taken place in 1996 - prior to the departure of the Sponsor - and there was nothing in sub-para (ii) which required anything other than that.

8. In light of the satisfaction of the Rule, the judge concluded that the Article 8 claim should succeed.

9. It is to be noted that the Claimant and Sponsor have four children together, all of whom reside in the United Kingdom with leave to remain in line with that of their mother. Their presence in this country has played no material part in the Claimant's case.

The grounds of appeal and grant of permission

10. The grounds put forward by the ECO to the First-tier Tribunal for permission asserted that the judge erred in failing to consider para 352A(iii). It is said that this provision requires the married "relationship" to have "existed" at the point at which the Sponsor left Pakistan and that it also had to have been "subsisting".

11. In refusing permission, First-tier Tribunal Judge Swaney was of the view that para 352A(iii) did not include a requirement that the marriage be subsisting at the point of the refugee's departure from their country of former habitual residence. It was said that if such a requirement had been intended, this would have been stated expressly. The Judge noted the absence of any authority suggesting a contrary approach.

12. The renewed grounds of appeal essentially replicate those originally put forward, with the additional argument that para 352A(ii) lends support to the interpretation of sub-para (iii).

13. Permission to appeal was granted by Upper Tribunal Judge Mandalia on 9 August 2019.

The relevant legal framework

14. Para 352A of the Rules reads 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."

15. The relevant provision of para 352G of the Rules state:

"Interpretation

352G. For the purposes of this Part:

…

(d) "Partner" means the applicant's spouse, civil partner, or 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."

16. The term "existed", as used in para 352A(iii), is not defined.

The hearing

17. At the outset, both representatives confirmed that they were unaware of any authority or indeed any other materials dealing specifically with the core question identified at the start of our decision.

18. Despite their dispute as to the correct interpretation of para 352A, both parties are agreed that our answer to the core question will be determinative of the Claimant's appeal. Mr Singh accepted that if we were to favour the Claimant's interpretation and to conclude that all criteria under para 352A were met, nothing else need be shown in order to succeed on Article 8 grounds. Conversely, Mr Khan accepted that if our conclusion on the interpretative question went the other way, there were no other features of the Claimant's case which would permit him to succeed.

19. Mr Singh relied on the grounds of appeal, as presented to the First-tier Tribunal and then to the Upper Tribunal in amended form. He submitted that the judge had failed to grapple with para 352A(iii), as she should have, given the conjunctive "and" at the end of sub-para (ii). He acknowledged the absence of any requirement that a relevant relationship must have "existed" (whatever the precise meaning of that term may be) "immediately" prior to the refugee's departure.

20. Mr Singh's positive arguments on the interpretive question were as follows. First, it was submitted that, adopting the natural and ordinary meaning interpretive approach, the term "existed" in para 352A(iii) was to be read as "subsisted", in the sense that the relevant relationship held an emotional quality prior to the refugee's departure.

21. Second, a contextual approach should be adopted. Reference should be had to other provisions within para 352A and 352D. It was submitted that sub-para (iii) had been inserted into para 352A for a reason: it must have some utility. Given that sub-para (ii) already included a temporal requirement that the relevant relationship was present prior to the refugee's departure, sub-para (iii), which also includes a temporal condition, must bring something more to the table, as it were. Otherwise, the requirement would be otiose. In Mr Singh's submission, this additional factor was that the relationship in question must have been subsisting at the relevant time, and the term "existed" should be interpreted accordingly. The requirement in sub-para (ii) that a cohabiting "relationship akin to marriage or a civil partnership" must have "subsisted" for two years or more prior to the departure of the refugee sponsor, supports the ECO's interpretation of sub-para (iii). If a requirement of subsistence was imposed upon those in a cohabiting relationship, those in a marriage or civil partnership should be treated similarly.

22. During the course of his submissions, Mr Singh acknowledged that recourse to the Refugee Convention may be appropriate when interpreting para 352A(iii).

23. Mr Khan made the point that the term "subsisted" could easily have been used in sub-para (iii) if that had been the intention. He submitted that the term "existed" had what he described as a "purely factual" meaning.

Discussion

24. We re-state the core issue in this appeal. With reference to para 352A(iii) of the Rules, can an individual rely on a relationship that merely "existed" immediately prior to the departure of that person from his/her country of former habitual residence, or must it be shown also to have been "subsisting"?

25. In answering this question, we are bound to say at this stage that the drafting of the sub-para leaves something to be desired and indeed its very presence appears anomalous.

26. The principal interpretative approach to the Rules is well-settled. At para 10 of Mahad [2009] UKSC 16, [2010] 1 WLR 48, Lord Brown stated:

> "10. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the ECO's administrative policy."

27. Having regard to the Shorter Oxford English Dictionary (6th Ed, 2007), we find that the term "exist" is defined in the following terms:

> "Have objective reality or being.
>
> Have being in a specified place or form or under specified conditions. Of a relation, circumstance, etc.: be found, subsisted.
>
> Continue alive or in being; maintain existence."

28. In our view, whilst the term "subsisted" is referred to, the definition as a whole inclines towards a meaning consistent with a state of affairs simply having an objective factual basis, without the added qualitative ingredient contended for by the ECO.

29. The term "subsisted" is attributed the following meanings:

> "Of a material or abstract thing: exist, have a real existence; remain in being, continue to exist, last."

30. The use of the word "real" in the definition would appear to lend weight to the argument that "subsisted" implies a qualitative characteristic going beyond a purely objective state of affairs.

31. With the above in mind, it is self-evident that the term which would support the ECO's case, namely "subsisted", is not used in para 352A(iii). We take it as a robust starting point that the precise words used in a particular Rule are the result of deliberate drafting decisions. (See, for example, R (Ahmed) v SSHD [2019] EWCA 1070 at [15].) The corollary of this is that the absence of words is also a consequence of a conscious act.

32. We think it is important to consider this provision in its full context. Having considered the Explanatory Memorandum to the Statement of Changes HC667 (which inserted sub-para (iii) into para 352A and had effect in relation to decisions taken on or after 24 November 2016.), we find no support for the ECO's case from this source.

33. We then turn to examine another aspect of para 352A itself. The argument put forward by the ECO in the renewed grounds of appeal relates to the wording of paragraph 352A(ii). It is said that the requirement that a "relationship akin to marriage or civil partnership" must have "subsisted" for at least two years prior to the refugee's departure from the country of their former habitual residence goes to show that a marriage or civil partnership must also have been subsisting as at the departure date, and that the term "existed" in sub-para (iii) should be interpreted accordingly.

34. This argument faces at least four significant obstacles.

35. First, as discussed previously, it was open to the Secretary of State when inserting sub-para (iii) into para 352A in 2016 or at any time thereafter, to have actually used the term "subsisted" rather than "existed". The choice of one over the other is telling.

36. Second, if there had been an intention to impose a requirement that a marriage or civil partnership had to be subsisting before the refugee sponsor left his/her country of former habitual residence, this could have been expressly stated in sub-para (ii) itself, as it is in respect of a "relationship akin to marriage or civil partnership".

37. Third, on the ECO's case, para 352A(iii) would effectively involve not simply the substitution of "subsisted" for "existed", but also the inclusion of additional qualificatory words. On its face, sub-para (iii) applies to all three types of relationship described in sub-para (ii): marriages, civil partnerships, and relationships akin to either. There is, as we have seen, already a requirement in sub-para (ii) that the third category of relationships must have "subsisted" prior to the refugee's departure. If, as contended by the ECO, the term "existed" in sub-para (iii) were to be given the meaning "subsisted", the result would be that the requirement could not apply to that third category because it had already been imposed in the previous sub-para. Otherwise, there would in effect be an anomalous and unnecessary replication of requirements for one category of relationships.

38. In order to avoid this unsatisfactory state of affairs, one would have to qualify which relationships were subject to the subsisting requirement by either reading into para 352A(iii) the words "in respect of a marriage or civil partnership," before "the relationship", or the words "if a marriage civil partnership" after "the relationship". The upshot of this is that a significant rewriting of the sub-para would be required, itself an undesirable course of action, in order to create an overall sense of consistency within the Role as a whole.

39. Fourth, the history of para 352A(iii) does not assist the ECO's case. In fact, it lends support to the Claimant's position. Prior to the changes brought about by HC667 in 2016, the Rule did not include relationships akin to marriages or civil partnerships. These were dealt with in para 352AA, the relevant provisions of which read as follows:

> "(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
>
> (iii) the relationship existed before the person granted asylum left the country of his former habitual residence in order to seek asylum"

40. The interaction between sub-paras (ii) and (iii) was logical: the former described the type of relationship and its qualitative character; the latter imposed a temporal requirement.

41. HC667 deleted para 352AA in its entirety and such relationships were brought within the purview of para 352A by way of an amendment to sub-para (ii). In addition, what was clearly a temporal requirement in para 352AA(iii) was effectively brought over in substantially the same terms to para 352A. For our part, we are not been

provided with any compelling argument as to why what was a temporal requirement under para 352AA should have somehow acquired a qualitative character during its journey from one Rule to the other. On the contrary, in our view there is a strong case for saying that the insertion of para 352A(iii) was undertaken without due thought to its relevance or utility within the amended para 352A as a whole.

42. There is an important consideration that might at first sight be thought to point the other way. If all that an applicant need show is that the marriage or civil partnership existed prior to the refugee's departure from his/her country of former habitual residence, the Family Reunion provisions may be laid open to abuse. The relationship in question may not have had any real substance prior to departure, but would entitle an applicant to rely on it for the purpose of family reunion, a concept which, as its name suggests, might be thought to rely on real relationships.

43. The danger of such abuse is, however, met by para 352A(v). This presents an important and necessary safeguard by requiring an applicant to show that he/she intends to live permanently with the refugee sponsor and that the relationship "is genuine and subsisting". The applicant referred to in the previous paragraph would be shut out by virtue of the failure to satisfy this qualitative criterion at the time of the decision on the application.

44. The present appeal provides an illustration of the safeguard in operation. Here, there had been a long-standing marriage. Due to his misconduct, the Claimant separated from the Sponsor and this separation continued up until the point of the latter's departure from Pakistan. The Claimant was only able to succeed before the First-tier Tribunal because the judge, having quite rightly carefully considered the possibility of there having been pressure applied to the Sponsor, accepted that the couple had reconciled, and that the relationship was now "genuine and subsisting", with reference to para 352A(v).

45. It may be said that there is a further opportunity for potential abuse. At the hearing, Mr Singh acknowledged the absence of the adverb "immediately" in front of "before" in para 352A(iii). We were not provided with any submissions on this point by either representative, but it may be suggested that if the term "existed" is given the meaning contended for by the Claimant, an applicant who had married or entered into a civil partnership, but then formally dissolved that relationship prior to the refugee's departure, could rely on the historical fact of its existence to obtain entry clearance under para 352A. To guard against this, so the argument would run, the term "immediately" should be read into sub-para (iii).

46. Rewriting sub-para (iii) yet again is an unattractive proposition. It would be the third occurrence, following the substitution of "subsisted" for "existed" and the qualificatory words distinguishing marriages and civil partnerships from relationships akin to either. Having said that, in seeking to navigate a sensible path through para 352A as a whole, it appears to us as though there must be a connection between the relationship relied on under sub-paras (ii), (iii), and (v). Therefore, the applicant whose marriage or civil partnership had been formally dissolved prior to the refugee's departure would not be able to show that "the relationship" relied on either "existed" (in the sense contended for by the Claimant) or was "genuine and subsisting". In

respect of relationships akin to marriages or civil partnerships, there is, as we have seen, an express qualitative element (in the sense that they must have been subsisting). If such a relationship had ceased to subsist by the time the refugee sponsor left the country, a core characteristic would have fallen away and it is difficult to see how "the relationship" could be "genuine and subsisting" at the point at which an entry clearance application was made.

47. Thus, the better reading of para 352A(iii) is that the term "existed" implies a state of affairs (i.e. a marriage, a civil partnership, or a subsisting cohabiting relationship) present as at the time of the refugee's departure from his/her country of former habitual residence.

48. Another provision of the Rules said by the ECO to be relevant is para 352D. The original grounds of appeal to the First-tier Tribunal contain the following passage:

> "It must be remembered that the purpose of the Family Reunion provisions is to ensure that families which have been split up due to persecution or ill-treatment can be reunited in a country of refuge. Those who were already living separately for other reasons do not come within the scope of these provisions, as is perhaps more clearly demonstrated by the terms of 352D, by which children of refugees who were not living in their household at the point of departure are ineligible for family reunion."

49. Para 352D(iv) of the Rules requires that a child applicant:

> "(iv) was part of the family unit of the person granted asylum at the time that the person granted asylum left the country of their habitual residence in order to seek asylum."

50. This particular provision was considered in BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055. Contrary to the ECO's assertion in the present case, the Tribunal held that there was no requirement that an applicant child had to have been living in the same household as the refugee sponsor at the relevant time. Such a limitation, if intended, could have been expressly included in the Rule, but had not been. Whether a child was part the refugee "family unit" was a matter of fact, to be assessed in light of the child's individual circumstances, and having full regard to what were described as "wide ranging childcare and child protection issues" likely to arise in cases where a decision to grant entry clearance may lead to a pre-existing family unit being broken up.

51. In our view, para 352D(iv) provides no real assistance to the ECO's case. There is no proper analogy to be drawn between that provision and para 352A(iii). Not only does the passage in the grounds of appeal overlook the central conclusion in BM and AL, but the absence of express words in para 352D(iv) in fact lends support to the Claimant's argument as to the proper interpretative approach to the provision with which we are concerned.

52. Thus far, we see very little by way of clear support for the ECO's contentions in this appeal. The wording of para 352A(iii), together with its place in the overall structure of the Rule, leads us a long way down the interpretive path signposted by the Claimant.

53. Are there wider contextual factors that draw us back and compel us to take a different direction?

54. Given that para 352A deals with family reunion in the context of one of the parties being a refugee, it is appropriate to have regard to legal instruments relating to that status and its consequential benefits.

55. The Refugee Convention itself does not contain a reference to the principle of family unity. However, the Final Act of the Conference of States adopting the Convention recommended that signatory states took "necessary" measures to ensure family unity (the relevant excerpts are set out in Annex I to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, February 2019. We note that Chapter VI of Part 1 of the Handbook itself offers nothing by way of material assistance).

56. As European law has sought to apply obligations arising out of the Refugee Convention, we have considered relevant provisions of Council Directive 2004/83/EC ("the Directive").

57. The relevant provisions of Article 23 of the Directive, under the heading "Maintaining family unity", state:

> "1. Member States shall ensure that family unity can be maintained.
>
> 2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.
>
> …
>
> 5. Member States may decide that this Article also applies to other close relatives who live together as part of the family at the time of leaving the country of origin, and who were wholly mainly dependent on the beneficiary of refugee or subsidiary protection status at that time."

58. Insofar as Article 23(1) is concerned, it takes the ECO's case no further. There is nothing incompatible with the need to "ensure that family unity can be maintained" and the interpretation of para 352A(iii) which we are inclined to adopt.

59. Article 2(h) of the Directive states:

> " 'family members' means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:
>
> - the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, whether legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens."

60. Of potential significance is the use of the term "existed" in Article 2(h) when defining "family members"; that being the same word used in para 352A(iii). Whilst terms used in EU law are not subject to the same relatively narrow interpretive approach as the Rules, we see no inconsistency between the definition in Article 2(h) and the natural and ordinary meaning of "existed" in para 352A(iii). In fact, we note that the definition of "unmarried partner" imposes the qualitative requirement of having to show stability, a characteristic that is in our view equivalent to such a relationship having "subsisted" within the meaning of para 352A(ii). Thus, the reasoning we have set out earlier in our decision relating to the interaction between sub-paras (ii) and (iii) and the proper meaning of "existed" is compatible with the Directive. It follows that our assessment of the wider refugee context does not compel us to the interpretive outcome sought by the ECO.

61. What then of the very presence of para 352A(iii) itself? If sub-para (ii) requires the relevant relationship (whether a marriage, a civil partnership, or a "relationship akin to" either) to have taken place or been present prior to the refugee's departure from the country of his/her former habitual residence, why then seemingly replicate that temporal restriction in sub-para (iii)?

62. The ECO's argument that para 352A(iii) should be interpreted so as to avoid it being superfluous is on the face of it a strong one. However, it does not, in and of itself, provide a sufficiently compelling justification for substantially rewriting the sub-para in order to give it an effect different from that which is apparent from the natural and ordinary meaning of the words used, when viewed in their proper context.

63. We fully appreciate that a consequence of this is that para 352A(iii) has little, if any, utility. In effect, it repeats the temporal requirement imposed on relationships by sub-para (ii). Yet, as alluded to earlier in our decision, the insertion of sub-para (iii) into para 352A does not appear to have been the subject of sufficiently close attention by the Secretary of State at the time or thereafter. A provision which served a clear purpose in the context of relationships akin to marriages or civil partnerships was moved, unchanged, from one rule to another only, on our analysis, to lose its *raison d'être*.

Conclusion on the core issue

64. We conclude that on its true construction para 352A(iii) of the Rules is satisfied by showing nothing more than the formal existence of a marriage or civil partnership at the time of the refugee's departure from his/her country of former habitual residence. In contrast to less formal relationships, there is no requirement to show that the relationship had the qualitative character of it having subsisted at the time of the refugee's departure.

65. This interpretation gives appropriate weight to the actual wording of the rule, its context and history. In addition, it is consistent with the principle of family unity as recognised within provisions of EU law pertaining to refugees.

Error of law decision

66. We now turn to consider the effect of our conclusion on the correctness of the judge's decision.

67. There is an error in the sense that the judge failed to address para 352A(iii) at all. However, that error was not material to the outcome of the appeal. She was right to have concluded that the Claimant's estrangement from the Sponsor prior to the latter's departure from Pakistan in 2012 was "not strictly relevant" to the satisfaction of the Rule. It was sufficient for the Claimant to show that he had been married to the Sponsor at all material times and that that relationship was currently "genuine and subsisting".

68. There has never been any suggestion by the ECO that anything more than a satisfaction of para 352A needed to be shown for the Claimant to have succeeded in his appeal before the judge. The allowance of that appeal "on human rights grounds" was, on the facts as found, wholly correct.

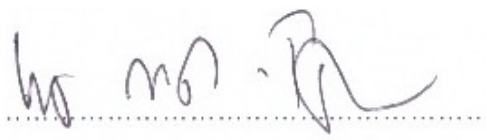
Anonymity

69. The First-tier Tribunal did not make a direction. None has been requested at this stage in proceedings. There is no reason to make such a direction in any event.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal shall stand.



Signed Date: 4 November 2019
Upper Tribunal Judge Norton-Taylor