Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/14600/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 2 July 2013	**On 23 August 2013**

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE
DEPUTY UPPER TRIBUNAL JUDGE Mc WILLIAM

Between

AMAANI SYED

Appellant

and

THE ENTRY CLEARANCE OFFICER MUMBAI

Respondent

Representation:

For the Appellant: Ms. S Iqbal instructed by Chesham and Co
For the Respondent: Mr. P. Deller Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 21 May 2013 we issued our ruling finding a material error of law in the decision of the First-tier Tribunal, setting aside that decision and giving directions for remaking that decision. A copy of those directions is set out annex A.

2. On 20 June 2013 Ms Iqbal supplied us with a skeleton argument and on 26 June 2013 an opinion from Syed Ahmad, an advocate of the Supreme Court of India. These materials suggested that the marriage between the parties celebrated in the Mumbai mosque at on 6 April 2012 was a valid marriage by two different routes:-

    i) Route One was that the registration of the marriage by the Marriage Officer Karnataka on 15 September 2012 under the s. 15 Special Marriage Act 1954 (SMA) validated the religious marriage as of the date of its celebration.

    ii) Route Two was the proposition that Indian law recognised a marriage between two muslims celebrated in a mosque as a valid marriage in the absence of registration if they had the capacity to marry.

3. The Entry Clearance Officer has not adduced any new evidence or submitted any reasons why the facts as we understood them to be at the time we issued the directions should not be applied in the remaking of this decision. Accordingly, the only issue of fact is whether at the time of the ECO's decision on 12 July 2012 the parties were validly married.

4. Mr Deller helpfully indicated that in the light of the evidence as it stood before us, he did not dispute that they were married and in the circumstances there was no reason why the appeal should not be allowed.

5. We accordingly indicated that the appeal would be allowed and brief reasons would follow.

6. On our primary findings the sponsor's previous relationship in the UK was not a in law a marriage and did not require any formal dissolution to give the sponsor capacity to marry according to the law of his domicile: English law.

7. The requirements of a valid marriage celebrated in India are those set out in the procedural requirements of local law (*lex loci celebrationis*). We are persuaded by the opinion of Mr Ahmad that the civil law in India defers to the personal law of the parties and recognises a bare *nikah* as a valid marriage if both parties to the marriage were muslim by professed faith and had the capacity to enter the marriage under their personal law (see Muslim Personal Law (Shariat) Act 1937). There is apparently no Muslim Marriage Act as such. Although there was a local law requiring registration of such marriages, Bombay Registration of Marriages Act 1953, s.7 of that Act, quoted in the opinion, makes plan that failure to register will not invalidate the marriage. There is nothing in the opinion or the materials annexed to it to indicate that these principles only apply to muslims who are domiciled in and /or nationals of India.

8. There is, therefore, some evidence before us that the couple's marriage in April 2012 was a valid one and none to suggest that it was not. Proof of foreign law is a matter of fact and accordingly we are satisfied on balance of probabilities that the marriage was valid, and in the circumstances, every relevant requirement of the Immigration Rules has been met.

9. We do not need to consider Ms Iqbal's route 1 that may have contained a number of problems about receipt of post-decision evidence and a possible conflict between the declaration on the face of the certificate and the terms of s.18 of the SMA.

10. We add that it may be prudent for a UK domiciled sponsor who marries by religious ceremony in India to apply to register the marriage under s.15 SMA as it resolves possible doubts that might exist in such cases. It would appear from a Government of India Press release that on 12 April 2012 the cabinet approved a Bill for compulsory registration of all marriages.

11. We further add, that had it been necessary to do so, we might well have concluded that the interference with enjoyment of family caused by the refusal of entry clearance in this decision, was not justified in the particular circumstances of this case. Before she applied for entry clearance the appellant through the sponsor asked the perfectly sensible question of the ECO whether registration was needed, to which no sensible response was given. To rely on the absence of registration as a sufficient basis to refuse the application when nothing in the application form, or the response to the question suggested it was needed would be so unfair as to be unjustifiable. The ECO has already received a very substantial fee for processing this application; it would be disproportionate to insist in a fresh application and fresh fee to permit the couple to live together in the United Kingdom.

12. However, on the evidence before us and in the light of Mr Deller's express acceptance of it, we allow this appeal because the appellant met the relevant requirement of the immigration rules to join the sponsor.

13. We express the hope that entry clearance can now be granted speedily on receipt of this determination. We give liberty to apply within six weeks of the date of this decision for the appellant to seek directions in the event that entry clearance has not been granted by then.

The Hon Mr Justice Blake

Chamber President

5 July 2013

Appendix A: Ruling and Directions 21 May 2013

1. The appellant is a citizen of India born in 1976. She appeals the decision of Judge Morris sitting in the First-tier Tribunal dated 22 March 2013. In that decision she dismissed the appellant's appeal against a refusal of entry clearance to join the sponsor in the United Kingdom as his wife. The sponsor is Mr Master who is a British citizen.

2. The basic narrative of events is as follows:-

   i. Mr Master had a previous partner in the United Kingdom Ms H.
   ii. Mr Master and Ms. H are both muslims by religion and celebrated their union in a nikah ceremony in their home.
   iii. Such a ceremony may have made them man and wife for the purposes of Islamic law but did not do so for the purposes of their respective civil status in the law of the United Kingdom.
   iv. The couple were in a personal relationship as man and wife from around 1997 to 2005. Two children were born to their union now aged 13 and 11.
   v. The couple lived for a time 28 Forburg Road London N 16.
   vi. The couple state they ceased living together as man and wife in about 2005.
   vii. It seems that Ms H married someone from India in that year by Islamic ceremony who was admitted to the United Kingdom as her spouse but the marriage subsequently broke down.
   viii. In 2011 Mr Master wanted a new partner and asked family and friends in India to assist him to find one for him.
   ix. The appellant was identified. She lived in Bangalore.
   x. In January 2012 the sponsor travelled to Bangalore and met the appellant; they decided to marry. The sponsor returned to India in February and again in April 2012.
   xi. They went through an Islamic marriage in the Khatib-E-Imam Mosque Mumbai on 6 April 2012.
   xii. The following day the entry clearance application was made.
   xiii. This was refused on 12 July 2012.

3. There is an unusual feature in this case that caused both the Entry Clearance officer and the judge concern. Mr. Master and Ms H continued to share a house after their separation. In January 2012, the house at Forburg Road was sold for £725,000. Mr Master bought another house at Rush Green Romford for £222,000. This was registered in the sole name of Ms H. A balance of £199,000 was paid into his account at Barclays in February 2012. In 16 January 2012 his conveyancing

solicitors stated that an unspecified sum was being retained by them for him to purchase a new home in the future.

4. In the meantime he moved to Romford with Ms. H and on his entry clearance application he proposed to live there with his wife in the short term in the event that entry clearance was granted. The house had four bedrooms, a living room and dining room and there was a report from an Environmental Health Consultant stating that the accommodation was adequate in size for the two households: Mr Master and the appellant, and Ms H and her two children.

5. The Entry Clearance Officer Mumbai refused the application because:-

    i. He was not satisfied that Mr Master was free to marry the appellant because of his previous relationship with Ms. H.
    ii. He was not satisfied that the marriage ceremony in India was a valid marriage because it had not been registered with the competent authority in the state marriage register.
    iii. He was not satisfied that the couple intended to live together as man and wife having regard to the short duration of their relationship and the sponsor's ties to Ms H.
    iv. He was not satisfied that the offer of free accommodation in Romford to the couple by Ms H was durable and stable.

6. When the case came before the Judge, the appellant had provided two bundles of material. In the first bundle there was a statement from Ms H expressing her willingness for the sponsor and his new wife to live rent free in her home in Romford until they established themselves elsewhere. She pointed out that the sponsor had provided her with the house in the first place and was actively involved in the upbringing of their children.

7. There was evidence of the sponsor's self-employment with gross earnings of £18,012 and his tax liabilities were up to date. His Barclaycard account stood at £103,000 as of 24 February 2012; there was £6,627 in his account at Lloyds Bank at the same date.

8. There was extensive evidence of his visits to India in February and April 2012, the wedding invitation and travel to Mumbai and a hotel accommodation following the wedding. There was a supplementary bundle that included post decision evidence including evidence of further visits to India by the sponsor in May, June and August 2012, medical evidence as to the pregnancy of the appellant and the subsequent registration of the marriage with the civil authorities in September 2012.

9. The sponsor and Ms H both gave evidence. They explained that their previous relationship was terminated by a *talaq* in January 2005, but they continued to live in the same house albeit in separate bedrooms. They both explained that the sponsor plays a role with the children driving one child to motor sports and martial acts

activities, the latter required a 45 minutes car journey from Romford to Stoke Newington N 16. Ms H confirmed she was still happy to accommodate the sponsor and his wife, who was now seven months pregnant and would be happy to do when the baby arrived.

10. In the course of submissions Ms. Shafiq who appeared below and before us submitted some internet material to the effect that an Islamic marriage was valid in India and there was no requirement for such a marriage to be registered with the civil authorities. One of the information sheets referred to the Special Marriage Act of India 1954. Ms Shafiq also referred to the fact that on 5 March 2012 the sponsor has emailed the visa inquiries section of the High Commission stating that he was about to have a religious marriage ceremony and inquiring whether the certificate of the religious ceremony was sufficient for entry clearance purposes and if not could the marriage be registered in the British Embassy. There is a reply in the bundle from the High Commission dated 12 March to the effect that each application was dealt with on its merits and that it was left to the discretion of the entry clearance officer to be satisfied to issue a visa and it was open to the parties to submit what documents they considered would satisfy the ECO.

11. The judge reached the conclusion at paragraphs 14 and 15 she was not satisfied that the appellant's alleged marriage to the sponsor was subsisting and the parties intended to live together as man and wife. She acknowledged that it was arguable that the Indian marriage did not need to be registered in India. She gave in effect seven reasons for this conclusion:

    i. No evidence had been adduced to support the testimony that the sponsor and Ms were no longer in a relationship. They continued to cohabit.
    ii. The witness to the talaq divorce between in January 2005 was not present at the hearing.
    iii. There was no evidence to show how Ms H and the sponsor had first married at the onset of their relationship.
    iv. Ms H produced evidence of her marriage to Mr H in December 2005 but this had not been produced to the ECO and was not in the appeal bundle but only handed up at the hearing, and she was not willing to attach weight to it.
    v. The reasons why the sponsor and Ms H shared a roof were conflicting. They both said it was because of the continued connection with the children but the sponsor also added he was waiting to buy another house when the price was right.
    vi. The judge did not think that the fact that the sponsor drove the child to martial arts was a good enough reason for him to remain in contact with Mr. H. She did not seem to think that a 45 minute drive for a 14 years old was a long distance to travel or one that could not be undertaken by public transport.
    vii. The judge was not willing to place any weight on other offers of accommodation for the sponsor.

12. The judge went on to make adverse findings as the evidence as to maintenance and accommodation and discounted the evidence of nuptial visits to India in the light of her doubts as to the relationship between the sponsor and Ms H.

Error of Law

13. We are satisfied that the determination of the judge involved significant errors of law material to her findings. We announced at the conclusion of the hearing that we would set aside her decision and remake it for ourselves. We now give our reasons for doing so.

14. The founding error, common to both the ECO and the judge was a misunderstanding as to the legal status of the relationship between Ms H and the sponsor. There was never a suggestion that either of them had entered into a marriage valid in the law of England and Wales. Both remained free to marry another person whatever the state of their personal connections with each other.

15. Whilst it was understandable that practising Muslims would undergo a religious ceremony in the United Kingdom, there was no point in proving such a ceremony on appeal as it had no relevance to the issue of capacity to marry as it was clearly no legal impediment to doing so. The record demonstrates that Ms Sharif was alert to this during the hearing but the judge appears not to have listened or understood.

16. An immigration appeal is not a confessional life history of the parties or their witnesses, but an informed and economical hearing of material relevant to the issues. The judge's reasons at paragraph 11 (iv) above is symptomatic of her error of approach. The sponsor's previous partner supported her witness statement that her relationship as spouse with the sponsor had terminated in January 2005. She pointed out that she had married someone else in December 2005 who had been admitted to the UK for this reason and she produced a marriage certificate. It was helpful of her to do so; but she was not on trial or making an application for entry clearance with a burden of proof to discharge. No reasonable judge properly directing herself could have drawn an adverse conclusion from the late production of such supporting information.

17. We have carefully examined each of the reasons of the judge that we have summarised above and conclude that each was materially flawed and combined together none of them remotely founds a rational basis to reject the oral and documentary evidence before the judge.

18. In particular we note as to i) cohabitation means living together as man and wife and not living together under the same roof and the judge mis-states the common evidence that the parties were living in separate bedrooms under one roof; ii) the evidence of the Islamic ceremony that founded the relationship between Ms H and the *talaq* that ended was irrelevant to the capacity to marry; iii) there was additional evidence independent of the parties indicative of the fact the sponsor and Ms H

were no longer in a matrimonial relationship including her 2005 marriage and successful sponsorship of a person from abroad, the sale of the3 house and the registration of the Romford property in Mr H's sole name and indeed the fact that Mr Master had wanted to marry someone else; iv) there was no conflict between the reasons given by the witnesses as to why the sponsor continued to live under the same roof as Ms H, the fact that he was waiting to buy a new home was a second but not a conflicting reason; v) the judge's doubts as to whether a 14 year could be expected to travel by public transport from Romford to Stoke Newington suggests that she does not understand the geography of London, public transport, or child care.

19. We would accept that the post-decision evidence of alternatives to accommodation to with the sponsor was irrelevant to the appeal and could be discounted, but this was not a reason to doubt Ms H's evidence that she was willing to let the father of her children who had provided her with a house in her own name live rent free with his wife until he established himself. We accept the arrangement was unusual and may not have appealed to many former couples, but the sponsor was frank and honest about this from the start, and the arrangements were not so unusual as to be incapable of belief. In the real world of terminating relationships with extravagant London property prices and the practical need for former couples to share child care, the arrangements are far from being either unique or unreasonable.

20. Taking the clear and consistent evidence between Ms H and the sponsor as whole we can simply find no sensible reason for rejecting it and certainly none that has been identified by the judge. In fact the judge has never stated that she rejects Ms H's evidence in terms. We are not surprised. We note that Ms H works as a police community support officer and there is nothing known to her discredit. Some relevant or cogent reason for rejecting her evidence would be needed before it could be discounted. The supposed absence of corroboration does not amount to such a reason. If her evidence is accepted as we conclude it should have been in these circumstances, the concerns about the appellant's relationship with the sponsor and the availability of adequate accommodation fall away.

21. The ECO took no issue on maintenance apart from the question of accommodation. Neither should the judge. The sponsor obviously had enough funds to support himself and his wife, from his gross earnings and extensive capital assets.

Remaking

22. We have no doubt that all of the judge's findings should be set aside and the decision remade.

23. Strangely the one issue with which the judge took no issue is the most difficult for the sponsor. This is whether the religious marriage in Mumbai is a lawful one for immigration purposes. We have seen no evidence that it is. We handed to the parties a copy of the Special Marriage Act 1954 (SMA) downloaded from the

internet at the date of hearing. If the text of the Act is accurate as of the date of the marriage, it would appear that the religious marriage did not meet the requirements for validity under this Act. There is no evidence that: a notice of intended marriage was served on the Marriage Officer as required by s.5,; the marriage was published in the Marriage Book as required b s.6; a declaration was made in the presence of the Marriage Officer as required by s.11; or that the marriage was solemnized and registered as required by ss. 12 and 13. Section 15 enables but does not require marriages celebrated in other forms to be registered under the SMA. This was not done at the time of the decision but has been performed subsequently in September.

24. There would be little reason to now doubt that the parties are married but that is not the issue on an entry clearance appeal where the focus is the evidence of events at the time of the decision.

25. If the appellant is to succeed under this appeal she would need to establish by cogent and reliable evidence that a nikah ceremony celebrated in a mosque in Mumbai between a British citizen domiciled in the UK and a woman resident in Bangalore was a valid marriage. We would be surprised if this turned out to be the case, but we are willing to adjourn the case until 2nd July 2013 for this matter to be fully explored with evidence. We do so because the ECO appears to have been open to the proposition in the response to the email and because the issue is of some general importance.

26. We will remake the decision on the same primary evidence as was before the ECO and the judge. For reasons we have already explained in the error of law decision, we see no reason to conclude other than that the sponsor was free to marry the appellant, the appellant and the sponsor intend to live together in a married relationship that is still subsisting, the couple have suitable accommodation when they first live together in the United Kingdom, and the sponsor is able to support his family without recourse to public funds. Absent some new evidence emerging to throw doubt upon this data, these are not matters that need to be re-argued on the next occasion.

27. We agree with Mr Deller that the argument made in the grounds of appeal that the ECO should have considered the appellant as a fiancée is without substance. No application was made in such category and it would have been necessary to have indicated that a UK marriage would take place shortly after arrival and there was no such evidence.

28. We accept that Article 8 is an issue for examination on the factual predicate of 23 above. Although the appellant would normally be expected to meet the rules a s a spouse, she could readily have done so if the response to the pre-application inquiry had explained that a civil registration of the marriage was required.

29. If the ECO was prepared to waive the requirement of a valid civil marriage if the relationship was otherwise genuine, then there is a compelling case for admission under Article 8 if the facts turn out to be as we have indicated. If the ECO was well aware that civil registration was required then the answer given was seriously misleading. Where an applicant pays something in the order of £800 for an entry clearance application to be processed, they are at least entitled to an accurate answer to a reasonable question.

Directions:

30. The same panel will remake this case on 2 July 2013. The appellant must supply any further evidence on the validity of the Indian marriage by 18 June 2013 together with a skeleton argument on the marriage and Article 8 issue. This material should be served on the Tribunal marked for the attention of the president and on Mr Deller personally who has indicated will retain conduct of this appeal for the respondent.

31. The respondent should file a written response to this material and these directions by 25 June 2013. This should indicate whether any cross-examination of the appellant's witnesses is sought.

32. We anticipate that in the absence of oral hearing 1 hour should be sufficient to determine this appeal

Signed

Date 21 May 2013

Chamber President