Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/01920/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 March 2014	**On 25 March 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MRS JAWERIA NASEER
(No Anonymity Direction Made)

Appellant

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellant: Miss R Akhter of counsel instructed by FLK Solicitors
For the Respondent: Mr G Saunders a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who was born on 5 April 1989. She has been given permission to appeal the determination of First-Tier Tribunal Judge Buckwell ("the FTTJ") who dismissed her appeal against the respondent's decision of 23 November 2012 to refuse to grant her entry clearance for settlement in the UK as the spouse of her husband and sponsor Mohad Aslam under the provisions of paragraph 281 of the Immigration Rules.

2. The respondent refused the application because the sponsor was previously married and had not shown that he had obtained a divorce that was recognised under UK law by the time he married the appellant on 26 March 2011. The decree absolute of divorce which he submitted was dated 20 December 2011. Whilst he could marry more than one wife under the laws of Pakistan he could not do so under the law of the UK where he was domiciled. No evidence had been supplied to show that he was domiciled anywhere else. The application was refused under the provisions of paragraph 281(i)(a)(i).

3. The appellant appealed and the FTTJ heard her appeal on 3 January 2014. Both parties were represented and the sponsor gave evidence. The appellant's representative accepted that she could not succeed under the provisions of paragraph 281 of the Immigration Rules. However, it was argued that the respondent should have considered the application under the separate provisions for fiancées in paragraph 290 of the Immigration Rules. The FTTJ found that there was no prospect that the application could have succeeded under the fiancée provisions. The appellant was not seeking leave to enter the United Kingdom for marriage because she and the sponsor considered that they were already married. In relation to the Article 8 grounds the FTTJ found that there was no expert evidence about marriages in Pakistan not recognised in the UK which would enable him to find that the appellant and the sponsor were stuck in a situation where the Immigration Rules could never be satisfied. He concluded that to exclude the appellant would not be a disproportionate interference with her right to respect for her Article 8 human rights. The appeal was dismissed under the Immigration Rules and on human rights grounds.

4. The judge did not make an anonymity direction. I have not been asked to do so and can see no need for such a direction.

5. The appellant applied for and was granted permission to appeal to the Upper Tribunal. There is a Rule 24 response from the respondent dated 21 February 2014.

6. Miss Akhter relied on CP (Section 86(3) and (5); wrong immigration rule) Dominica [2006] UKAIT 00040. I find that this does not assist the appellant. Unlike CP this is not a case where the respondent applied the wrong immigration rule. In that case the result of applying the wrong immigration rule was that the immigration decision was technically unlawful. In this appeal it is clear that the appellant was making a marriage application which had to be decided under paragraph 281 of the Immigration Rules. The respondent considered and decided the application under the correct immigration rule and the decision was lawful. Paragraph 16 of CP does not assist Miss Akhter's submission. It states; "reading these provisions together, we are left in no doubt that they impose a legal duty upon decision-makers acting to regulate entry and stay in the UK to apply the immigration rules and, specifically, to apply the correct immigration rules applicable to the circumstances put forward by the individual in his application to (sic) entry or

stay in the UK". The appellant made her application on the form used for marriage settlement applications and direct and indirect references to settlement and marriage appear throughout the application form. It is clear beyond doubt that it was a marriage application and not a fiancée application. I find that neither the respondent nor the FTTJ were under any duty to consider the application or the appeal under the Immigration Rules on any basis other than as a marriage application. The test is not whether the application would or might have succeeded had it been considered as a fiancée application under paragraph 290, although had it been I would agree with the FTTJ that the appellant would, at the least, have had difficulty in satisfying the requirements of paragraph 290. She was not seeking leave to enter the UK for marriage because she and the sponsor considered that they were already married. Whilst the sponsor told the FTTJ that if the appellant could come to this country he would undertake a civil marriage ceremony with her this information was not available to the respondent at the date of the decision.

7. Whilst the Presenting Officer at the hearing before the FTTJ indicated that if it was considered appropriate he would not object to the matter being remitted to the respondent for further consideration it was for the FTTJ to decide whether this was appropriate. I find that he did not err in law in rejecting this course of action. He could only have done so if he had come to the conclusion that the respondent's decision was not in accordance with the law. This was not the case.

8. In relation to the Article 8 grounds Miss Akhter submitted that the FTTJ erred in law by failing to weigh in the balance and the proportionality exercise the fact that the appellant and the sponsor could not live together as husband and wife in the UK. On the evidence before the FTTJ I am not persuaded that this is or was the case. The appellant claims that now the sponsor has obtained his divorce and because she is already married under the laws of Pakistan it is not possible for them to go through another ceremony of marriage in Pakistan which would be recognised in the UK. There is no expert or country information to show that this is the case. Miss Akhter also argued that, even if the appellant and the sponsor were able to go through another form of marriage which would be recognised in the UK they would fall foul of the current more stringent financial criteria. I can find no indication that this argument or any evidence to support it was put to the FTTJ.

9. I find that there is no error of law and I uphold the determination of the FTTJ.

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Signed Date 13 March 2014

Upper Tribunal Judge Moulden