Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/21918/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 12 March 2014	**On 14 March 2014**

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

SAIQA MAHROOF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharma, Solicitor of Eden Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant a citizen of Pakistan born on 16 August 1983. She appealed against the decision of the Respondent dated 8 October 2012 in refusing her application for entry clearance to come to the United Kingdom as the spouse of a

person present and settled here. The relevant Immigration Rules were paragraphs 281(i)(a) and (ii); 281(i); 281(iii) and 281(iv) of HC 395 as amended.

2. The Appellant's appeal was heard at Hatton Cross before First-tier Tribunal Judge Wyman who in a determination promulgated on 4 November 2013 dismissed it under the Immigration Rules and under Article 8 of the ECHR.

3. The First-tier Tribunal Judge having heard and considered the oral evidence of the Sponsor and the documentary evidence before her, found the Sponsor

> "to be a credible witness with a genuine intent to support his wife's application for leave to enter as a spouse. Generally with a few exceptions (that I will discuss below) I found his oral evidence corresponded with the documentary evidence provided."

4. The Judge went on to find that she disagreed with the Respondent's conclusion that he was not satisfied that the Appellant had provided a valid English Language Test certificate and therefore found in favour of the Appellant in terms of paragraph 281(i)(a)(ii).

5. The Judge went on to identify the following at paragraph 29 of her determination:

> "The key issue in this case is whether or not the Sponsor was domiciled in the United Kingdom or in Pakistan. The law in Pakistan clearly allows polygamous marriages".
>
> 50. The facts of the case are not in dispute. The Appellant married the Sponsor in Pakistan on 24 April 2011. The Sponsor was previously married to Tahzeem Iqbal. The civil divorce certificate confirms that Mr Mahroof's decree absolute was pronounced on 18 April 2012".

6. In summarising the Appellant's representative's submissions, the Judge noted that the Sponsor was born in Pakistan and that it was contended that this was his domicile of origin. The Sponsor had not lost his domicile in Pakistan. He had retained very strong links with the country. He had married his first wife in Pakistan in 1994 and his second marriage also took place in Pakistan in 2011. The Sponsor's family owned land in Pakistan and his family retained a family home. The Sponsor had family both in Pakistan and the UK, although his immediate family (excluding his wife) lived in the United Kingdom. He had visited Pakistan throughout his life. It followed that the domicile of the Sponsor, remained that of Pakistan.

7. The First-tier Judge reasoned as to why she did not agree. Whilst the First-tier Judge fully accepted that the Sponsor had retained close links with Pakistan, she found that his domicile was that of the United Kingdom. It followed therefore that the marriage of the Appellant to the Sponsor was not a valid marriage according to United Kingdom law and for this reason the Judge was not satisfied that the Appellant could meet the requirements of paragraph 281(i) of the Rules. The Judge further proceeded

within her determination to provide her reasons for concluding that the Appellant's Article 8 claim should also fail.

8. The Appellant made a successful application for permission to appeal and in giving his reasons for granting permission, Designated Judge RC Campbell had this inter alia to say:

> "The Appellant's case was advanced on the basis that her marriage to her Sponsor, a British citizen, was lawful and valid. Although the marriage took place in April 2011, about a year before a decree absolute ended his first marriage, her Sponsor retained his domicile in Pakistan and so the marriage failed to be recognised as lawful.
>
> The Judge found, however that the Sponsor who came to the United Kingdom when he was 1 year old and who has lived in the United Kingdom for his entire life, although he had visited Pakistan on several occasions, was domiciled here. The requirement of paragraph 281(i) of the Rules was not met. The Judge went on to make an Article 8 assessment. She concluded the Appellant and her Sponsor did not enjoy family life together and that refusal of entry clearance was a proportionate response.
>
> The grounds in support contend that the Judge erred, firstly, in relation to the validity of the marriage. The marriage was a valid one in Pakistani law and the conclusion that the Sponsor was domiciled here was perverse and against the weight of evidence. The Judge found the Sponsor to be a credible witness with a genuine intent to support his wife's application for leave to enter. His evidence should have been accepted 'as a totality and not in piecemeal'. Furthermore the Judge failed to take into account Abdin [2012] UKUT 309."

Designated Judge Campbell went on to express the view that there was no merit in this ground and that the Judge had not erred in her self-direction on the law which took into account the substantial reliance by the Appellant on SM [2008] UKAIT 00092.

9. Designated Judge Campbell continued however as follows:

> "Secondly, it is contended that the Judge erred in failing to determine the appeal under paragraphs 290 and 295A of the Rules, which apply where fiancés seek leave to enter. It is clear from the grounds of appeal the Appellant's case was also advanced on the basis that the fiancé provisions of the Rules should have been considered by the Respondent. At the very end of the Record of Proceedings, the Judge has recorded a submission by the Appellant's representative if she were not persuaded that the Sponsor was domiciled in Pakistan, the Tribunal ought to consider the case in the light of paragraphs 290 and 295A taking into account SZ [2007] UKAIT 00037. Notwithstanding the very great care with which the determination has been prepared, there is nothing in it addressing that submission or engaging with it. It is arguable that the Judge may have erred in law in failing to consider whether SZ had any impact and in failing to consider whether the fiancé(e) Rules had any bearing on the case.
>
> Finally it is contended that the Judge's findings on Article 8 are perverse. Although she found there was no valid marriage between the Appellant and her Sponsor, she also found that their relationship subsisted. The Article 8 assessment is, at paragraphs 63 to 75 and appears to be thorough. However, it is arguable that any assessment in this context ought to have taken into account the Appellant's alternative case that the fiancé(e) Rules fell to be applied.
>
> Permission to appeal is granted and all the grounds may be argued".

10. Thus the appeal came before me on 12 March 2014 where my first task was to decide whether or not the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

11. In that regard and at the outset of the hearing, I was most helpfully informed by both representatives, that clearly the Judge had erred in failing to determine the appeal in the alternative under paragraphs 290 and 295A of the Immigration Rules and that it followed that should the Judge have found that the Appellant complied with those Rules the issues relating to Article 8 of the ECHR would have fallen away.

12. To that extent therefore the parties were in agreement that this was an issue pleaded in the grounds before the First-tier Judge that still had to be considered and determined.

13. There was however a difference of opinion between the parties' as to whether the Judge had erred in concluding that the Appellant's marriage was not valid because her Sponsor was found to be domiciled in the United Kingdom.

14. In that regard Mr Melvin raised what I might describe as a mild concern as to whether Designated Judge Campbell made a typographical error in view of the fact that he had considered there to be "no merit in this ground" in granting permission to appeal on all of the grounds.

15. I pointed out to Mr Melvin that it was not for the Tribunal to speculate as to the Designated Judge's intentions. It was however clear that permission had been granted on "all of the grounds" and the Tribunal would thus proceed on that basis.

16. Mr Sharma on behalf the Appellant submitted that there was a presumption in favour of domicile of birth and that strong and cogent reasons were required to find an alternative domicile. He submitted that whilst it was open to a Judge to find that a given individual was no longer entitled to rely on a domicile's birth, that in reaching that conclusion the Judge would have to address not only the documentary evidence but also the witness' evidence of his own intentions, in the round.

17. Mr Sharma contended that in the present case, the First-tier Judge appeared to have concluded that the Sponsor chose to be domiciled in the UK through his actions but that she failed to consider firstly, the presumption of domicile of the country of birth and secondly the Sponsor's own evidence as to his intentions.

18. In that regard Mr Sharma relied on the Judge's finding that the Sponsor was a credible witness and submitted that credibility should have been read into all of the evidence rather than in a piecemeal fashion.

19. Whilst Mr Melvin argued that the reasoning of the Judge in concluding that the Sponsor's domicile was in the United Kingdom was open to him on the evidence, he

was unable to identify any aspect of the First-tier Judge's determination that demonstrated a consideration as to whether the Sponsor had retained a domicile of birth.

20. As I observed to the parties, it is trite law that domicile of birth is not easy to dislodge. I thus agreed with Mr Sharma that "strong and cogent reasons were required to find an alternative domicile".

21. In any event I observed that whilst the Judge made reference to the Appellant's country of birth, she did not cross-refer with the submissions in terms of establishing a domicile of birth and as Mr Sharma rightly pointed out, she did not seem to have placed this matter "in the weighing scales in balancing that part of the reasoning".

22. In such circumstances I was able to inform the parties that I was satisfied that for the above reasons, the First-tier Judge had materially erred in law.

23. There was agreement between myself and the parties, that in such circumstances and in consequence of my findings, it followed that there had been no satisfactory hearing of the substance of this appeal at all.

24. The scheme of the Tribunal's, Courts and Enforcement Act 2007 does not assign the function of primary fact-finding to the Upper Tribunal. In such circumstances Section 12(2) of the TCEA 2007 requires us to remit the case to the First-tier or remake ourselves.

25. For the reasons I have given above and with the agreement of the parties, I concluded that the decision should be remitted to a First-tier Tribunal Judge other than First-tier Tribunal Judge Wyman to determine the appeal afresh with all issues at large at Hatton Cross on 23 July 2014. I was satisfied that there were highly compelling factors falling within paragraph 7.2(b) of the Senior President's Practice Statement decision that the decision should not be remade by the Upper Tribunal. It is clearly in the interest of justice that the appeal of the Appellant be heard afresh in the First-tier Tribunal.

26. For this purpose it was arranged that the substantive hearing would have a time estimate of two hours. There would be oral evidence given by the Sponsor for which purpose no interpreter was required.

27. Both parties further agreed with me, that for this purpose, the interests of justice would not be served if the Appellant were deprived of the positive and accepted findings of the First-tier Judge in her favour. I agreed therefore that the following paragraphs of the First-tier Judge's determination should be preserved, namely paragraphs 44 to 48, paragraph 60 and in relation to paragraph 61 whilst the First-tier Judge's finding that she accepted that the Appellant could meet paragraphs 281(i)(a)(ii), 281(iii) and 281(iv) should be preserved, her finding that she was not satisfied the Appellant could meet paragraph 281(i) of the Immigration Rules would

not be preserved. Indeed on all other respects the First-tier Judge's findings would not be preserved.

Decision

28. The First-tier Tribunal erred in law such that their decision in the present appeal should be set aside. I remit the remaking of the appeal to the First-tier Tribunal at Hatton Cross for hearing on 23 July 2014, to be heard before a First-tier Tribunal Judge other than First-tier Tribunal Judge Wyman.

29. As before no anonymity direction is made.

Signed Date 14 March 2014

Upper Tribunal Judge Goldstein