Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/22751/2012
OA/22756/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 March 2014	**On 23rd April 2014**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

AFZALA GHAFAR (FIRST APPELLANT)
ALINA GHAFAR (SECOND APPELLANT)

Appellants

and

ENTRY CLEARANCE OFFICER - ISLAMABAD

Respondent

Representation:

For the Appellants: Mr Nasim, instructed by M&K Solicitors
For the Respondent: Ms Pal, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Pakistan who were born respectively on 3 February 1984 and 8 August 2010. The second appellant is the daughter of the first appellant.

The appellants had applied for entry clearance to the United Kingdom with a view to settlement with Muhammad Ghafar (hereafter referred to as the sponsor). The applications (made respectively under paragraphs 281 and 301 of the Immigration Rules) had been refused by the Entry Clearance Officer by notices dated 10 October 2012. The appellants appealed to the First-tier Tribunal (Judge Thanki) which, in a determination dated 11 November 2013, dismissed the appeals. The appellants now appeal, with permission, to the Upper Tribunal.

2. The facts of the appeals are not in dispute. The first appellant and the sponsor had entered a religious marriage in Pakistan but the sponsor had failed to complete his divorce from his first wife (who was living in the United Kingdom) at the time of the marriage the sponsor and first appellant had "married" on 26 October 2009; the decree nisi in the divorce of the sponsor from his first wife was not made absolute in proceedings in Watford County Court until 3 March 2011.

3. The grounds of appeal assert that the judge wrongly found that the sponsor had been domiciled in England and Wales at the date of his marriage to the first appellant. On the basis that the sponsor had been domiciled at that time in Pakistan, his polygamous marriage to the first appellant was valid and the first appellant's application should not have been refused under paragraph 281(i)(a).

4. Quite apart from the careful and cogent findings of the judge on this very issue at [20] the appellants face a major problem in relation to their Immigration Rules appeals. At the hearing before the First-tier Tribunal Judge, the solicitor acting for the appellants "confirmed that the ground of appeal in relation to paragraph 281 and 301 were being abandoned" [determination, 16]. As a formality, at [24] the judge went on to dismiss the appeals under those paragraphs. Before me, Mr Nasim sought to persuade me the appellants had, in fact, not abandoned their appeals under the Immigration Rules. Had they done so, there would have been no need for the judge at [20] to have made a finding as to the sponsor's domicile.

5. I reject Mr Nasim's submissions. The determination could not be clearer. The representative of the appellants told the judge that the appellants did not seek to continue with their appeals in relation to paragraphs 281 and 301. This left only the appeals under Article 8 ECHR and I find that the judge proceeded correctly by making a finding of fact in respect of the sponsor's domicile at the date of his marriage for the purposes of that ground of appeal. Mr Nasim submitted that, if the Immigration Rules appeals had been effectively abandoned, then this might indicate that the entire appeal had also been abandoned. I disagree. Section 84 of the Nationality, Immigration and Asylum Act 2002 provides that an appeal under Section 82(1) against an immigration decision must be brought on "one or more" of the grounds which are then set out in Section 84. I can identify no difficulty in the appellants abandoning their grounds under Section 84(1)(a) ("that the decision is not in accordance with the Immigration Rules") but maintaining the human rights appeal under Article 8 ECHR.

6. It is clear that the judge accurately recorded the appellants' representative's withdrawal of the Immigration Rules grounds and that the same representative attempted to persuade the judge that the first appellant's appeal should be considered under paragraph 290 of HC 395 (grant of entry clearance as a fiancé). I do not find that the representative would have made that submission had the appeals in respects of paragraph 281 and 301 been maintained. I also find that the judge properly rejected the submission that the Tribunal should consider the appeal under paragraph 290. The judge had proper regard to *CP (Section 86(3) and (5): wrong immigration rule) Dominica* [2006] UKAIT 00040. The judge found that this was not a case of a "wrong" application having been made under the Immigration Rules but rather a complete change in the nature of the application for entry clearance. The judge found at [23] that "it is [not] fair on the respondent for me to make a decision in relation to the first appellant as a fiancé under paragraph 290 as the requirements of that Rule need to be considered fully by the respondent to see if the first appellant meets all the requirements."I can identify no error of law in that finding.

7. The paragraphs 281 and 301 appeals having been abandoned and the judge having rejected the attempt to appeal in respect of paragraph 290, the only aspect of the appeal that remained to be determined was the appeal on Article 8 ECHR grounds. The judge at [25] wrote:

> Article 8 ECHR has been raised by the appellant. It is clear that there was no family life between the appellants and their sponsor in the UK. The sponsor has spent a few weeks with the first appellant after their purported marriage and has revisited them in 2012. Therefore what the family life exists in Pakistan to which there is no interference (sic). The sponsor is of Pakistani origin and is free to travel to Pakistan as desired. I find Article 8 ECHR rights are not engaged.

8. I acknowledge that it is arguable that the low threshold for the engagement of Article 8 family life may have been met in this instance and that the judge was wrong to find that it was not. However, I do not consider any error on the part of the judge to be material to the outcome of the appeals. It would have been extraordinary for the judge to have allowed the appeals under Article 8 where the appellants had abandoned their Immigration Rules appeals acknowledging that they were certain to fail. Following *MF* [2013] EWCA Civ 1192, it is clear that only a small number of unusual cases will succeed under Article 8 ECHR where an appellant has failed to satisfy the Immigration Rules. There must be a strong public interest concerned with preventing the grant of entry clearance to individuals under Article 8 where those individuals have failed under the Immigration Rules.

9. This brings me to the question of the sponsor's domicile. The judge found at [20] that "on any account" the appellant was domiciled in the UK in 2009. He arrived in this country in 2006 and been granted indefinite leave to remain in August 2008. The judge found that, at the date of his marriage, he had "settled status… in the UK." Domicile can be notoriously difficult to ascertain in any given case but I consider that the judge's findings are cogent, well-reasoned and firmly based on the evidence and I do not consider that he erred in law by concluding that the sponsor was domiciled in the United Kingdom at the date of his marriage. However, even if I am wrong in

that conclusion (i) the fact that the Immigration Rules appeals under paragraphs 281 and 301 were abandoned; (ii) the judge decided that the first appellant's appeal should not be considered under paragraph 290 and (iii) the Article 8 ECHR appeals should have been dismissed on the basis that the immigration decisions were not disproportionate then, as the Secretary of State submitted in her Rule 24 response "It is not clear… how the issue of the finding on domicile can arise as material."

DECISION

10. This appeal is dismissed.

Signed Date 10 April 2014

Upper Tribunal Judge Clive Lane