Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/03220/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 21 July 2015	**On 17 August 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ENTRY CLEARANCE OFFICER (DHAKA)

Appellant

and

KUHINUR AKTHER EMA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr G. Davison, Counsel
For the Respondent: Mr S. Kandola, Home Office Presenting Officer

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Entry Clearance Officer, represented by the Secretary of State, is the appellant in this appeal before the Upper Tribunal.

2. The respondent refused the appellant's application for entry clearance as a spouse in a decision dated 16 February 2014. The respondent was not

satisfied that the appellant produced sufficient evidence to show that she had contracted a valid marriage in Bangladesh. The respondent was not satisfied that the UK sponsor divorced his first wife according to the Muslim Family Laws Ordinance 1961 and was therefore free to marry the appellant on 26/06/13. The respondent also refused the application in relation to the financial requirements but the respondent does not seek to challenge the First-tier Tribunal's findings in relation to that issue.

3. The appellant appealed against the decision. First-tier Judge Herbert allowed the appeal in a decision promulgated on 10 April 2015. The First-tier Judge's findings were succinct and were as follows:

> "24. In particular I had the appellant's two statements and that of the sponsor. I had the marriage certificates, English as a second language certificate at page.43-46, the sponsor's supporting documents including the letter from the Islamic Sharia Council at page 59 confirming that the laws were consistent with Bangladeshi Muslim Personal Law code and it was an accepted divorce certificate under Islamic Sharia law.
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> …
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> 30. The UK Sponsor was entirely credible in terms of his being full and candid about his relationship with his wife and the circumstances of his divorce. I find that there is ample documentary evidence to substantiate this.
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> 31. The authorities are clear that the onus rests of the party asserting that documents are fraudulently obtained or false. A generalised comment by the Respondent that documents such as divorce certificates are commonly obtained in Bangladesh is insufficient.
>
> 32. The burden rests upon the Respondent to establish some basis for alleging that the document is fraudulent in this case and it is not simply sufficient to say that they are generally available easily in Bangladesh.
>
> …
>
> 33. I am satisfied on a balance of probabilities that the relationship with his former wife had broken down irretrievably and they had a divorce under Islamic law recognised as such by the Islamic Sharia Council of the United Kingdom confirmed by [them] in writing."

4. The respondent was granted permission to appeal against the decision. The respondent argued that the First-tier Tribunal Judge failed to engage with the contention that the sponsor was not free to marry. The sponsor's divorce would only be recognised in the UK if formal requirements were met. There was no evidence to show that he had given notice to the Chairman of the Ward in writing with a copy also going to his wife in accordance with the Muslim Family Laws Ordinance 1961.

5. The matter comes before the Upper Tribunal to determine whether the First-tier Tribunal decision involved the making of an error of law.

6. I heard submissions from both parties, which have been noted in my record of proceedings and where relevant are incorporated into my findings.

Decision and reasons

7. After having considered the grounds of appeal, the oral arguments and the documentary evidence I am satisfied that the First-tier Tribunal decision involved the making of an error of law.

8. The First-tier Tribunal Judge correctly stated that the burden of proof is on the respondent to produce cogent evidence to support an allegation of forgery. However, the respondent did not make any specific allegation that any of the documents produced in support of the application were false documents. The respondent questioned whether the evidence produced by the sponsor was sufficient to show that a valid divorce took place thereby leaving the sponsor free to marry the appellant on 26 June 2013. In order to assess whether the First-tier Tribunal Judge made an error of law it is necessary to consider the evidence produced in support of the appeal in order to ascertain whether his conclusions relating to the "divorce certificate" (in fact the evidence is an entry from the register) are sustainable or not.

9. The notice of refusal stated that the sponsor did not produce a UK divorce certificate even though both he and his first wife lived in the UK. The talaq divorce certificate issued in Bangladesh would only be recognised in the UK if it complied with the formal requirements governing divorce in that country, which was the Muslim Family Laws Ordinance 1961. The talaq divorce was not obtained through formal court proceedings and was therefore obtained "otherwise than by means of proceedings" for the purpose of the Family Law Act 1986.

10. Section 46(1) of the Family Law Act 1986 states that a divorce obtained by means of "proceedings" shall be recognised in the UK if the divorce is effective under the law of the country in which it was obtained and at the relevant date either party to the marriage was:

    (i) habitually resident in the country in which the divorce, annulment or legal separation was obtained; or

    (ii) was domiciled in that country; or

    (iii) was a national of that country.

11. Section 46(2) of the Family Law Act 1986 states that a divorce obtained "otherwise than by means of proceedings" shall be recognised in the UK if the divorce is effective under the law of the country in which it was obtained and at the relevant date:

    (i) each party to the marriage was domiciled in that country; or

(ii) either party to the marriage was domiciled in that country and the other party was domiciled in a country under whose law the divorce, annulment or legal separation is recognised as valid; and

(iii) neither party was habitually resident in the UK throughout the period of one year immediately preceding that date.

12. Section 54(2) of the Family Law Act 1986 defines "proceedings" as "judicial or other proceedings". The respondent's policy document "Partner: Recognition of marriage and divorce" (IDI – Chapter 8, Section FM 1.3 - July 2012) states that a talaq divorce registered in accordance with the Muslim Family Laws Ordinance 1961 is treated as "proceedings" for the purpose of section 46(1) of the Family Law Act 1986.

13. Section 7(1) of the Muslim Family Laws Ordinance 1961 states that any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of talaq, give the Chairman notice in writing of his having done so, and shall supply a copy to the wife. Section 7(3) states that a talaq shall not be effective until the expiration of 90 days from the day on which the notice is delivered to the Chairman. The purpose of the 90 day period is to allow time for the Chairman to convene an Arbitration Council for the purpose of bringing about reconciliation between the parties before the divorce becomes final (section 7(4)).

14. As evidence of his divorce the sponsor produced a copy and translation of the divorce register dated 23 June 2013. The register appears to refer to an entry made on 05 June 2013. The sponsor and his first wife are both named and it states that the divorce was given to his wife by way of talaq. Section (6) is headed "whether the bride has accepted Khula Talak in presence of Registrar" and the record then states "according to the viva & written petition and Divorce Notice & on sheet affidavit cause of description".

15. The sponsor also produced a copy of the Nikah Nama for his marriage to the appellant dated 25 June 2013. The form only asks for information as to whether the bride is divorced but rather unhelpfully does not request the same information of the groom. However, in section 21 of the Nikah Nama the form specifically asks whether the groom has an existing wife and whether he has secured the permission of the Arbitration Council to marry another according to the Muslim Family Laws Ordinance 1961 (section 6). The Nikah Nama states "none".

16. On the face of these two pieces of evidence the sponsor's divorce was registered on 05 June 2013 and when he married on 25 June 2013 the Nikah Nama gives no indication that he had an existing wife. No specific challenge was made to these two pieces of evidence save to say that such documents were "readily available" in Bangladesh. The First-tier Tribunal Judge was correct to say that the burden rested on the respondent to show that a document is fraudulent and that the general comments made in the notice of decision were insufficient to meet the burden of proof.

17. If that been the only evidence before the First-tier Tribunal Judge I would have no hesitation in concluding that his findings were sustainable. However, I have now had the benefit of detailed arguments on the law and evidence and must consider whether the failure of the First-tier Tribunal Judge to consider other aspects of the evidence amounted to an error that was material to the outcome of the appeal.

18. After the application was refused the sponsor wrote a letter to the respondent dated 11 July 2014 and enclosed further evidence in support of the application. Although the letter does not state exactly what evidence was submitted there are at least two other documents that post date the initial decision that are relevant to the question of the validity of the marriage. I find that I can take these documents into account in so far as it is likely that they were before the Entry Clearance Manager when the case was reviewed on 09 January 2015. In any event the documents relate to the validity of the marriage as it was said to stand at the date of the original decision.

19. The first document is an affidavit sworn by the sponsor in which he pronounces talaq to his first wife. The document is dated 22 May 2013 but the translation is dated 20 March 2014. The application was refused on 16 February 2014. I find that it is reasonable to infer from the date of the translation that the document was translated after the notice of decision and therefore it is likely that it was sent for consideration after the application was refused. On the face of it this document complies with the requirement of the Muslim Family Laws Ordinance 1961 to notify a talaq to his wife in writing but in other respects it does not comply with the requirements. The date of the affidavit and the date when the divorce is said to have been registered on 05 June 2013 does not appear to comply with the requirement of a 90 day reflection period in which the Arbitration Council may seek to reconcile the couple. The period between the affidavit and the registration of the divorce is only around two weeks.

20. The affidavit does not mention any previous notification of the talaq and on the face of the wording it appears to be the document in which talaq is formally announced four times. There is no evidence to show that it was served on the Chairman of the Union Parishad before it is said the divorce was registered on 05 June 2013 although the register itself indicates that his wife received some documents.

21. The sponsor also produced a copy of a letter from the Chairman of his local Union Parishad dated 16 March 2014. The letter states:

> "For the creation of dispute between the both parties, the 1st party Shamsul Haque Ali on last 22/05/13 by registered post sent the affidavit of divorce (by husband to wife) before the notary public Sylhet to 2nd party Mst. Parvin Akther Ali. Afterwards on last 05/06/13 A.D. the 1st party divorce the 2nd party vide Khola talak form of Marriage Registrar & Kazi Office.
>
> Being informed that the marriage is terminated by the evidence of affidavit before the Notary Public and divorce by Khola Talak Form, this certificate of divorce is issued."

22. The translation is not in clear English but nothing in this document appears to suggest that the affidavit was sent to the Chairman of the Union Parishad at the time when it was made. It only makes reference to the affidavit being served on the sponsor's first wife. The letter purports to be a "certificate of divorce" but it quite clearly post-dates the date when the sponsor claims the divorce was registered and the sponsor's subsequent marriage to the appellant. There is no suggestion from the Chairman of a reflection period or any effort to convene and Arbitration Council in accordance with the Muslim Family Laws Ordinance 1961.

23. The First-tier Tribunal Judge placed weight on the letter from The Islamic Shari'a Council in the UK dated 12 June 2014. The letter stated:

> "This is to confirm that we have seen the Bangladeshi divorce certificate No.30 dated 22/05/13 between Shamsul Haque Ali and Parvin Afkhter Ali is accordance with Bangladeshi Muslim personal Law code. We certify that this is an accepted divorce certificate under Islamic Sharia Law."

24. I find that no weight can be placed on this document as evidence that a valid divorce took place in accordance with Bangladeshi law. Firstly, it is unclear what expertise The Islamic Shari'a Council in the UK has in Bangladeshi law. The letter does not make correct reference to the Muslim Family Laws Ordinance 1961. Secondly, the letter appears to refer to the affidavit dated 22 May 2013 and not to the validity of the entry made in the divorce register. On the face of the affidavit it was nothing more than a bare talaq, which might be sufficient under Sharia law but not for the purpose of the Family Law Act 1986. Thirdly, the opinion of The Islamic Shari'a Council has no legal force in the UK in so far as it confirms the validity of a divorce in Bangladesh.

25. If the divorce register and Nikah Nama were the only documents before me I would conclude that the First-tier Tribunal Judge was entitled to find that the respondent had failed to produce sufficient evidence to undermine the validity of those documents. However, the sponsor produced further evidence after the application was refused which is inconsistent with the terms of the Muslim Family Laws Ordinance 1961 and therefore undermines the reliability of the initial evidence that he produced in relation to the divorce. As such the evidence that the First-tier Tribunal Judge appears to have overlooked was capable of making a material difference to the outcome of the appeal and his failure to consider that evidence amounts to an error of law.

26. Both parties made detailed submissions and were content to rely on them if I found an error of law and went on to remake the decision. I have already incorporated the various points made by the representatives both for and against the weight to be given to various documents. Even if the respondent did not produce sufficiently cogent evidence to show that the copy of the divorce register was a false document the overall burden of proof is still on the appellant to show that the documents produced in support of the appeal were reliable as evidence to show that the sponsor contracted a valid divorce for the purpose of UK law before marrying the

appellant on 25 June 2013. The appellant does not seek to argue that there is an alternative procedure for divorce in Bangladesh so it is necessary to show that the divorce was carried out in accordance with the relevant law in Bangladesh. The appellant cannot not succeed in arguing that the divorce was obtained "otherwise than by means of proceedings" because the Family Law Act 1986 requires neither party to be habitually resident in the UK for at least one year immediately preceding the date and the sponsor was habitually resident in the UK. The appellant must show that the divorce was obtained by way of "proceedings" and under Bangladeshi law the relevant proceedings take place under the Muslim Family Laws Ordinance 1961.

27. I bear in mind that the standard of proof, which is the balance of probabilities, allows some room for doubt but even taking that into account the inconsistencies in the further evidence produced by the sponsor appear to diverge quite starkly from the procedure outlined in the Muslim Family Laws Ordinance 1961. As such I cannot be satisfied on the balance of probabilities that a valid divorce took place before the sponsor remarried on 25 June 2013. While some evidence supports the appellant's case other pieces of evidence undermine it. As a whole the evidence is sufficiently unreliable to satisfy me that a valid divorce took place at the relevant time for the purpose of section 46(1) of the Family Law Act 1986.

28. No arguments were put forward in relation to the appellant's family life under Article 8 of the European Convention. It is clear from the evidence that the sponsor is able to visit the appellant in Bangladesh. The Court of Appeal in *SSHD v SS (Congo)* [2015] EWCA Civ 387 made clear that Article 8 will only be engaged outside the immigration rules where there are compelling circumstances and that it is likely to be a slightly more stringent test in cases involving entry clearance. The appellant's case has not been prepared with human rights issues in mind and the witness statements are silent as to the effect of the decision. For these reasons I conclude that no issues relating to human rights are engaged on the evidence currently provided in this case.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside

I remake the decision and DISMISS the appeal

Signed  Date 13 August 2015

Upper Tribunal Judge Canavan